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No. -

In The

Supreme Court of the United States

October Term, 1991

RALPH LEVINE and MELVIN KAMINS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the defraud clause of 18 U.S.C. §371 properly be employed to prosecute the pre-assessment concealment of property when Congress has determined, through enactment of 26 U.S.C. §7206(4), that only the post-assessment concealment of assets is a crime, unless committed as an act of tax evasion?

2. Does Rule 15 of the Federal Rules of Criminal Procedure permit the taking of foreign depositions which have been presided over, controlled and circumscribed by the equivalent of a United states prosecutor and are depositions taken in this manner inconsistent with the Fifth and Sixth Amendments to the United States Constitution?

3. Is 18 U.S.C. §3505 unconstitutional since it permits the admission of foreign business records without first requiring adequate guarantees of trustworthiness via the testimony of a custodian of the records who is available for cross-examination regarding the regularity of the record keeping process?

LIST OF PARTIES

The parties to the proceeding in the Court of Appeals were David A. Sturman, Ralph L. Levine, Reuben Sturman and Melvin Kaminsky as appellants and the United States as appellee.

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PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case October 24, 1991.

OPINIONS BELOW

On October 24, 1991, the United States Court of Appeals for the Sixth Circuit affirmed the convictions of Reuben Sturman, David A. Sturman, Ralph L. Levine and Melv. Kaminsky. That

decision is reported at 951 F.2d 1466 and is reproduced in the appendix at pages A1-41.[1]

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals affirming the convictions was filed on October 24, 1991. The petition for rehearing and rehearing *en banc* were denied on January 8, 1992. Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1254(1) and Rule 13.1 of the Rules of this Court.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the United States Constitution, 18 U.S.C. §§ 371 and 3505, 26 U.S.C. §§ 7201 and 7206, Rule 15 of the Federal Rules of Criminal Procedure, Rules 28 and 30 of the Federal Rules of Civil Procedure, and Rules 803(6) and 804 of the Federal Rules of Evidence are reproduced at A51-69.

STATEMENT OF THE CASE

Count I of the superseding indictment, filed in this case on June 25, 1987, charged Reuben Sturman, David Sturman, Ralph Levine and Melvin Kaminsky[2] with conspiring to defraud the United States, in violation of 18 U.S.C. §371, by "hampering, hindering, impeding, impairing, obstructing and defeating the

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[1] References to "A" are to the appendix to this petition. References to "T" are to the transcript of the proceedings in the District Court.

[2] Kaminsky, who is a party to this petition for certiorari, pled guilty to Count I of the indictment on August 17, 1989. He had joined with the other defendants in the motion to dismiss Count I of the indictment, denied by order of the United States District Court for the Northern District (Ho.. George White) on September 6, 1989 and subsequently appealed the denial of that order to the United States Court of Appeals for the Sixth Circuit as expressly permitted by his plea agreement.

lawful governmental functions of the Internal Revenue Service of the Treasury Department of the United States in the ascertainment, computation, assessment and collection of income taxes." (Superseding indictment, Count I, p. 2.) Counts II through XVI related solely to Reuben Sturman and charged him with a number of underlying substantive criminal offenses, including attempted tax evasion, filing false income tax returns, willfully failing to maintain records and file reports, and endeavoring to obstruct justice.

On November 17, 1989, after trial by jury, defendants Reuben and David Sturman and Ralph Levine were found guilty on Count I and Reuben Sturman guilty on Counts II through XVI. Ralph Levine was sentenced on February 12, 1990 to the custody of the Attorney General for a period of three years and fined $10,000. The defendants' convictions were affirmed by the United States Court of Appeals for the Sixth Circuit on October 24, 1991 and defendants' petitions for rehearing with suggestion for rehearing *en banc* were denied by the Court on January 8, 1992.

The essence of the case brought by the Government was that Reuben Sturman, the owner of several adult entertainment bookstores and distributorships, had conspired with his co-defendants to conceal his income and assets from the Internal Revenue Service. As found by the Sixth Circuit, the Government established that Reuben Sturman had engaged in a variety of methods and means to achieve that goal. He created both foreign and domestic corporations, whose nominees and stockholders were often fictitious persons but whose beneficial owner was Reuben Sturman. These corporations were utilized as a means of secreting assets, as were Swiss bank accounts. The Government alleged, as well, that the defendants had skimmed money from some of the adult bookstores, by not reporting it as taxable income but instead using it to defray personal expenses or deposit-

ing it in the Swiss accounts. Levine, as part owner of four of Sturman's bookstores in Las Vegas, was charged with skimming a portion of the income of those stores at Sturman's behest and then transferring the cash directly to Sturman.

As evidence of the substantive crimes committed by Reuben Sturman, the Government established that he had filed tax records containing false statements and inaccuracies and that he did not report his ownership in the domestic and foreign corporations he had created or his signature authority over foreign bank accounts.

The basis for federal jurisdiction in the District Court is 18 U.S.C. §3231.

REASONS FOR GRANTING THE WRIT

POINT I

THE UNITED STATES SUPREME COURT SHOULD RULE ON THE SCOPE OF THE DEFRAUD CLAUSE OF 18 U.S.C. §371, PARTICULARLY WHEN IT HAS BEEN EMPLOYED TO PROSECUTE CONDUCT WHICH IS NOT A CRIME UNDER THE APPLICABLE SUBSTANTIVE STATUTE

Petitioners seek a grant of certiorari because the primary issue raised in this case is a significant one and one which has generated differing opinions in the Sixth Circuit Court of Appeals. The specific question is whether the Government can properly employ the defraud clause of §371 to prosecute the pre-assessment concealment of property when Congress has determined, through enactment of 26 U.S.C. §7206(4), that only the post-assessment concealment of assets is a crime, unless committed as an act of tax evasion (*see*, 26 U.S.C. §7201).

The context in which this question arose was the Sixth Circuit's analysis of §371 in *United States v. Minarik*, 875 F.2d 1186 (6th Cir. 1989). It was under the auspices of this case that petitioners predicated their motion to dismiss Count I of the indictment filed against them, charging a §371 conspiracy to defraud the Government.

In *Minarik*, defendant Campbell had been notified that she owed the IRS approximately $100,000 in back taxes. A month after the tax assessment notice was issued, Campbell and her friend, defendant Minarik, sold Campbell's house with the proviso that the purchase price be paid in cashiers checks in amounts less than $5,000. The defendants cashed the checks at sundry banks until a suspicious teller notified the IRS. Internal Revenue agents arrived at the scene, secured the cashiers checks, and sought a search warrant for Campbell's car, alleging in their papers that the defendants were attempting to frustrate the reporting requirements of 31 U.S.C. §5322.[3]

The indictment which followed charged, instead, that the defendants had sought to defraud the Government under 18 U.S.C. §371 by impeding the Treasury Department through the concealment of the sale of the property and the income derived therefrom.

The bill of particulars delineated two theories of prosecution: a conspiracy to avoid the law's currency reporting requirements and a tax evasion theory charging that the defendants sought to conceal their assets and business affairs in order to avoid levy by the IRS.

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[3] Section 5322 is that provision of the Bank Secrecy Act which criminalizes a bank's failure to report transactions over $10,000 to the IRS.

The trial court granted the defendants' motion for judgment notwithstanding the verdict, ruling that the Government's fluctuating theories of the case and inability to articulate exactly what duty to the Government the defendants had transgressed, resulted in a failure of proof.

The Sixth Circuit Court of Appeals affirmed that holding, doing so, however, on the far more provocative theory that because the post-assessment concealment of assets from the IRS constitutes a specific substantive offense under 28 U.S.C. §7206(4), the conspiracy to commit that offense should properly have been charged under the "offense" clause of §371, rather than the "defraud" clause. That interpretation, the Court opined, would complement Congress' intent in enacting the statute, prevent the defraud clause of the statute from untoward and unnecessary expansion, and eliminate the confusion generated by the Government's varied theories of prosecution.

The *Minarik* panel had been concerned that an overly expansive interpretation of the statute would expose it to ready abuse, a problem which the Court saw as amenable to judicial intervention:

> But when, as in the *Hammerschmidt* case, the judicial branch sees a definition of 'defraud' that itself is subject to continual expansion, it retains the counterveiling responsibility to keep that definition from engulfing the statute itself and obliterating the carefully drawn relationship between its two clauses. Thus the scope of the 'defraud' clause may expand as new kinds of fraud and new kinds of governmental programs are invented, or it may contract when Congress deals specifically with a given problem, *creating a specific offense out of conduct previously criminalized only where it took the shape of a conspiracy to defraud the United States.*

Minarik, 875 F.2d at 1193 (emphasis added).

In *Minarik*, the Sixth Circuit determined that, with the 1954 amendment of 28 U.S.C. §7206(4), criminalizing the post-assessment concealment of assets, any concealment prior to authorization of levy, such as that charged in *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), *cert. denied* 355 U.S. 924 (1958), was no longer a crime unless committed as an act of tax evasion: "Section 7206(4), as amended, therefore reflects a deliberate choice of Congress to criminalize concealment only of the sort and only under the circumstances defined in the language of the statute." *Minarik*, 875 F.2d at 1194.

The nub of the *Minarik* ruling was reaffirmed and reiterated but a short time later in *United States v. Gibson*, 881 F.2d 318, 320-21, n.1 (6th Cir. 1989), with the Sixth Circuit stating: "We recently held that 'conspiracies to commit specific offenses (which are also arguably general frauds)' must be prosecuted 'exclusively under the offense clause of §371 . . . .' *United States v. Minarik*, 875 F.2d 1186, 1194 (6th Cir. 1989)."

Petitioners at bar had argued at trial and upon appeal that the *Minarik* decision precluded the Government from prosecuting, as a conspiracy to defraud, the alleged concealment of assets for which levy had not been authorized.

Count I of the indictment charged the petitioners with a conspiracy to defraud by:

> Hampering, hindering, impeding, impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue Service of the Treasury Department of the United States in the ascertainment, computation, assessment and collection of income taxes.

(Superseding Indictment, Count I, page 2).

The bill of particulars specified that the sole object of the conspiracy was to impede the Department of the Treasury via the concealment of Reuben Sturman's income and asse and the

Sixth Circuit likewise noted that the conspiracy charged against Sturman and associates was patterned after *United States v. Klein, supra*, which is generally viewed as the paradigm of a conspiracy to defraud the Government by concealment of goods and income.

Given that the Sixth Circuit had so recently indicated that such concealment *prior* to notice of levy was not a crime unless committed as an act of tax evasion (26 U.S.C. §7201; *see, United States v. Hook*, 781 F.2d 1166 (6th Cir.), *cert. denied*, 479 U.S. 882 (1986)), petitioners argued that the Government had improperly and illegally prosecuted them for pre-assessment activities of concealment by transposing them into a conspiracy to defraud.

This panel of the Sixth Circuit affirmed the convictions, however, rejecting the heart of its earlier analysis of the interplay between the offense and defraud clauses of §371 and holding that the conspiracy at bar, encompassing a greater number and variety of criminal acts, must be distinguished from that in *Minarik*:

> This was not a conspiracy to violate specific provisions of the Tax Code but one to prevent the IRS from ever being able to enforce the Code against the defendants. Only the defraud clause can adequately cover all the nuances of a conspiracy of the magnitude this case addresses (A6).

Petitioners ask this Court to review the scope of the defraud clause within the framework of *Minarik's* analysis of the statute's legislative history and purpose. While this panel of the Sixth Circuit would now seek to limit the applicability of *Minarik*, the issues raised in the case are substantial ones and the Sixth Circuit itself seems to be of two minds about future applications of

Minarik. Thus, in the case before this Court. *United States v. Sturman, et al.*, the Sixth Circuit accepted the *general* principles of *Minarik*, reiterating that:

> [W]hen Congress creates a specific offense out of conduct which was previously criminalized only if it took the shape of a conspiracy to defraud the United States, the Court should require that a criminal conspiracy regarding that conduct be brought exclusively under the offense clause (A5).

That tacit acceptance of *Minarik* stands in opposition to the opinion of another panel of the Sixth Circuit in *United States v. Mohney*, 949 F.2d 899 (6th Cir. 1991), a case which not only distinguished *Minarik* factually but also spurned the construct of that opinion, writing that it espoused an ill-advised rejection of precedent:

> [T]he Supreme Court has explicitly held that the existence of a specific statutory provision encompassing the charged conduct does not prevent prosecutors from bringing charges under the defraud clause. *Dennis v. United States*, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966).
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> * * *
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> [R]equiring prosecutors to use the offense clause any time a conspiracy violates a specific offense would contradict the Circuit's holding in *United States v. Schaffner*, 715 F.2d 1099, 1102 (6th Cir. 1983), that '[a]t the indictment stage, the United States is free to prosecute under any applicable statute without regard to which statute is most specifically tailored to the facts alleged.'

Mohney, 949 F.2d at 902-903.

The mix is further complicated by still another panel of the Sixth Circuit which approved *Minarik* in *United States v. Gibson*, 881 F.2d 318, 320-21, n.1 (6th Cir. 1989), wherein the Court,

as noted earlier, assented to *Minarik* as a broad rule of prospective value.

In past, this Court has granted certiorari in order to resolve an intracircuit conflict, most often when the underlying issue is an important and recurring one.[4] Petitioners assert that this case should ignite the Court's interest, not only because of the difference of opinion it has engendered among various panels of the Sixth Circuit, but also because this Court's recent analysis of 18 U.S.C. §371 has been limited to but a few cases and then, in a context not designed to answer the questions raised by *Minarik* and progeny.

In *Tanner v. United States*, 483 U.S. 107 (1987), while commenting on the breadth of the interpretation it had, in past, given the defraud clause, this Court said that it would not "reconsider that aspect of the scope of §371 in this case." *Id.* at 128. In *Dennis v. United States*, 384 U.S. 855 (1966), relied upon heavily by the Government herein, this Court quoted *Haas v. Henkel*, 216 U.S. 462, 479 (1910), for its determination that a conspiracy to defraud under §371: "reaches any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government."

While the *Dennis* Court did reject the petitioners' argument that their indictment should have been filed under the offense clause of §371 (as a conspiracy to file false statements in violation of 18 U.S.C. §1001) the Court did so on the discrete ground that such a conclusion was not compelled, as petitioners had maintained, by *Bridges v. United States*, 346 U.S. 209 (1953). *Bridges*, the *Dennis* Court observed, did not turn upon the construction

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[4] *See*, for example, *John Hancock Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950); *Maggio v. Zeitz*, 333 U.S. 56, 59-60 (1948); *Scarborough v. United States*, 431 U.S. 563, 567, n.4 (1977).

of §371 but rather, upon the ancillary question of whether the Government could revive a time-barred prosecution by reference to the Wartime Suspension of Limitations Act which applied to offenses involving frauds against the United States. This Court found that the charge of conspiracy to defraud in *Bridges* was disingenuous and filed only to resuscitate an otherwise untimely prosecution.

The slender reed upon which *Dennis* was decided, along with the Court's recognition in *Dennis* that conspiracies to defraud must be scrutinized with care, provides ballast for the contention that the scope of the defraud clause of §371, when it has been used to criminalize conduct not actionable under a substantive statute, should be taken up for consideration by this Court. The question is not dissimilar to that at issue in *Bridges:* whether the Government can prosecute non-criminal concealment as a conspiracy to defraud and whether such a prosecution does not amount to a subversion of Congressional intent and the equivalent of the prosecutorial "sleight of hand" denounced in *Bridges*.

The single basis for distinction offered by the Sixth Circuit was that the case at bar fell outside the ambit of *Minarik* because of the magnitude of the conspiracy alleged: "[o]nly the defraud clause can adequately cover all the nuances of a conspiracy of the magnitude this case addresses."

In challenging the acuity of that conclusion, petitioners ask the Court to determine whether the attempt to distinguish *Minarik* from the matter at bar is not grounded upon what is essentially a baseless distinction: the scope of the conspiracy as measured by the number of statutory violations. The most basic maxim of the law of conspiracy provides that the gist of the conspiracy is the agreement itself. Whether that conspiratorial agreement encompasses the violation of one or many statutes is irrelevant. *Braver-*

man v. United States, 317 U.S. 49, 53 (1942). And, in this case, any fair reading of the indictment underscores that the conspiracy alleged was one to eschew responsibility for taxes. Regardless of how varied the manner and means of doing so, the conspiracy alleged was a tangible claim of tax evasion which could have been prosecuted under 26 U.S.C. §7201.

Ralph Levine was charged with conspiracy to conceal Reuben Sturman's assets from the Internal Revenue Service in order to impede it in the assessment of Sturman's taxable income. To distinguish what is concededly a *Klein* conspiracy from the principles of *Minarik* because of the "wide variety of income tax violations" and the "nuances" covered in the indictment is to create the same sort of ambiguity regarding theories of prosecution that the Sixth Circuit exposed in *Minarik*.

The general viability of a *Klein* conspiracy among the Circuits (*see*, e.g., *United States v. Helmsley*, 941 F.2d 71 (2d Cir. 1991), *cert. denied* 60 U.S.L.W. (2/25/92), is acknowledged by petitioners. Yet, that prevalence of opinion should not dissuade this Court from reviewing what has caused, in the Sixth Circuit at least, recurring and significant differences of opinion about the scope of the defraud clause. In *McNally v. United States*, 483 U.S. 350 (1987), holding that the federal mail fraud statute, 18 U.S.C. §1341, does not extend to intangibles such as good government, the Court conceded that its decision was a rejection of established precedent in the various courts of appeals. Thus, the ready acceptance of a legal theory which has virtually remained untouched by this Court should spark, rather than hinder, review.

POINT II

THIS COURT SHOULD DETERMINE WHETHER THE SWISS DEPOSITIONS WERE INADMISSIBLE SINCE THEY WERE NOT TAKEN IN COMPLIANCE WITH THE REQUIREMENTS OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND BECAUSE THEY VIOLATED THE PETITIONER'S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT

Pursuant to the request of the Government, made under the aegis of the Mutual Assistance Treaty,[5] the trial court granted the Government permission to depose, in Switzerland, four bank officials who resided and worked in that country. Prior to and during the depositions, at trial and again on appeal, the defendants objected to the manner in which the depositions had been taken, arguing that the methods used and the restrictions employed complied with neither the spirit nor the letter of the Federal Rules of Criminal Procedure and furthermore, violated the guarantees of the Fifth and Sixth Amendments to due process and the right to confront and cross-examine accusing witnesses.

Petitioner Levine asserts that this case presents an apt occasion for review of Rule 15 of the Federal Rules of Criminal Procedure since the format utilized by the Swiss was so inimical to our notions of fundamental due process during cross-examination that it should prompt this Court's examination of Rule 15's outermost boundaries. With the possible exception of *United States v. Salim*, 855 F.2d 944 (2d Cir. 1988), upon which the Sixth Circuit

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[5] Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States - Swiss Confederation, 27 U.S.T. 2019, T.I.A.S. No. 8302.

rested its decision below, no other court has approved so blatant a departure from accepted norms of criminal procedure as these depositions represent.

A. *The Depositions.*

The essentials of the depositions, taken from June 5 through June 8, 1989 can be outlined briefly. They were conducted, not by a neutral magistrate or judge, but by the District Attorney of Zurich, Benedikt Holdener (T4216). In his role as District Attorney, Holdener had assisted the United States Government in prosecuting the defendants by executing the Government's request under the Mutual Assistance Treaty. He had also been responsible for the January, 1984 (false) arrest of Reuben Sturman (T4217) and, further revelatory of his position as prosecutor, had earlier interviewed, on the Government's behalf, one of the witnesses whose deposition was taken (T4467).

Holdener dismissed all objections to his partisanship and thus, the depositions began. None of the witnesses took an oath or affirmation to tell the truth. Rather, District Attorney Holdener simply advised them of the potential penalties for testifying falsely.

The United States court stenographer, whom the trial court had ordered to transcribe the proceedings so that he might evaluate their fairness upon completion, was not permitted to make any transcription. Indeed, no verbatim transcription was made. Instead, a "Recording Clerk" typed out only what Holdener dictated to him (T4213).

The examination of the witnesses was controlled entirely by Holdener. A question in English was propounded by either a defense attorney or the Government's attorney. It was then translated into German for Holdener who determined whether or not the question would be asked of the witness (T4221). If Holdener

decided that the question was acceptable, it was he who asked it of the witness, who was present with his attorney. Oftentimes, there would be an exchange among the witness, his attorney and Holdener (T4221). These dialogues were not always translated, in their entirety, into English.

Further, and as mentioned, the record of the proceedings was not a verbatim transcription nor was it a contemporaneous recording. Rather, Holdener gave the typist his German summary of the defense or prosecution question and his precis of his interchanges with the witness and his attorney (T4222-24). When the summaries were typed, they were submitted to the deponents who were permitted to edit them at will (T4243). The summaries of these depositions, conducted over four days, comprised a mere 78 pages, indicating that the bulk of the proceedings was omitted from the purported record.

The Sixth Circuit affirmed the admission of the depositions at trial, relying on the conclusion of *United States v. Salim*, 855 F.2d 944, 953 (2d Cir. 1988), that "unless the manner of examination required by the law of the host nation is so incompatible with our fundamental principles of fairness or so prone to inaccuracy or bias as to render the testimony inherently unreliable." (A22).

B. *The Relevant Legal Standard.*

The inherent tension between the Confrontation Clause, with its dual rights of face-to-face confrontation and cross-examination, and the public policy interest in effective law enforcement have caused this Court to steer "a middle course" (*Ohio v. Roberts*, 448 U.S. 56, 66, n.9 (1980)) in an effort to accommodate both constitutional claims and public policy.

Thus, while still extolling the uniqueness of cross-examination and face-to-face encounter as the best barometers of the truth, this Court has dispensed with the right to confrontation at trial when the statement sought to be introduced falls within one of those hearsay exceptions so "firmly rooted within our jurisprudence" that its "indicia of reliability" were guaranteed, thereby assuring the trier of fact of the truthfulness of the evidence. In *Ohio v. Roberts,* 448 U.S. at 66 (1980), this Court summarized those principles as follows:

> When a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

While prior testimony is recognized to be a hearsay exception "firmly imbedded within our jurisprudence" (*see*, Fed.R.Evid. 804[b][1]; *Mancusi v. Stubbs*, 408 U.S. 204, 213 [1972]; *Ohio v. Roberts, supra*), petitioner submits that the depositions in this case do not fall within that exception since they do not partake of those reassuring characteristics of prior testimony as interpreted by this Court; nor were they "taken in compliance with law" as required by Rule 804.

Indicative of the chasm between the depositions at bar and the kind of prior testimony considered an exception to the hearsay rule is that preliminary hearing testimony approved by this Court in *California v. Green*, 399 U.S. 149, 165 (1970). There, prosecution witness Porter had testified against the defendant at a preliminary hearing and this Court affirmed the admission of the testimony at the subsequent trial, despite the defendant's Sixth

Amendment objection. As to the reliability of the preliminary hearing evidence, this Court observed:

> Porter's statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. Porter was under oath; respondent was represented by counsel — the same counsel in fact who later represented him at the trial; respondent had every opportunity to cross-examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings.

Certainly, the Swiss depositions at bar were not informed by these indicia of reliability; nor do they comply with the mandate of Rule 15 providing, *inter alia*, that depositions should be taken in the manner permitted in civil actions provided that "the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself." The examination and cross-examination conducted bore no resemblance to what would be permitted at trial. It was unduly circumscribed by an individual who was neither neutral in fact or in law. The lack of a verbatim, contemporaneous transcript precluded the trial court from reviewing what had occurred with an eye towards ruling upon its ultimate admissibility at trial. It is apparent that the 78 pages of summary compiled after four full days of hearings cannot compare with the sort of prior testimony, admissible under the hearsay exception, approved in cases such as *California v. Green, supra*, and *Ohio v. Roberts, supra*.

This purported "prior testimony" fails to meet any standard of acceptability articulated by this Court. Nevertheless, the Sixth Circuit has ruled it consonant with the demands of the Constitution solely on the basis of what it denominated the "test" of *United States v. Salim, supra*, which essentially ignores *all* deviation from the federal rules. Given the gulf between the two sorts of prior testimor petitioner questions whether, in this case,

other particularized guarantees of trustworthiness were not necessary prior to a ruling of admissibility and whether the outermost boundaries of Rule 15 should not be examined by this Court so that its continued expansion does not remain unchecked.

POINT III

THE UNITED STATES SUPREME COURT SHOULD GRANT CERTIORARI TO REVIEW AN ISSUE OF FIRST IMPRESSION: THE CONSTITUTIONALITY OF 18 U.S.C. §3505

Petitioner asks that the Court further consider whether 18 U.S.C. §3505, permitting the introduction at trial of foreign business records, is not unconstitutional given that it dispenses with the requirement of a witness who can attest to the reliability and authenticity of the business records and who is thereby subject to the Sixth Amendment right to confrontation and cross-examination. The issue is an important one since the statute, enacted in 1984 as part of the Comprehensive Crime Control Act, has not been reviewed by this Court and because, as indicated in its recent decision of *White v. Illinois*, 112 S.Ct. 736 (1992), the Court has shown itself still to be in disagreement about the reach of the Confrontation Clause and the point of intersection between the hearsay rule and the Sixth Amendment.

In the case at bar, volumes of foreign bank records were admitted against the defendants — records which were central to Count I of the indictment charging that the defendants had conspired to hide Reuben Sturman's assets from the IRS by depositing them in foreign bank accounts opened under false names. The certifications which purported to authenticate the records of these accounts serve to highlight the constitutional infirmity and practical difficulty of substituting a certification, not amenable to adequate challenge, for a live witness who is present and available to testify under oath. The certifications below were not af-

fixed to the records they supposedly authenticated, did not specify which records were being authenticated or contain the assertions mandated under Section (a)(1) of the statute. Nevertheless, the Sixth Circuit affirmed their admission at trial, simply adjudging them "adequate" under the statute (A41) and refusing to consider the constitutional implications raised by the defendants.

18 U.S.C. §3505 permits the introduction of foreign business records if those records contain a certification which attests that:

> (A) such record was made, at or near the time of the occurrence of the matter set forth, by (or from information transmitted by) a person with knowledge of those matters;
>
> (B) such record was kept in the course of a regularly conducted business activity;
>
> (C) the business activity made such a record as a regular practice; and
>
> (D) if such record is not the original, such record is a duplicate of the original.

This section was considered "a simple, inexpensive substitute for the cumbersome and expensive procedures presently required for the admission of foreign business records". H.R. Rep. No. 907, 98th Cong., 2d Sess. 4-6 (1984), reprinted in 1984 U.S. Code Cong. and Admin. News 3578. Moreover, the statute was intended to parallel Rule 803(6) of the Federal Rules of Evidence (*id.* at 4) which allows, as an exception to the hearsay rule, the introduction of domestic business records if:

> Made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, *all as shown by the testimony of the custodian or other qualified witness.* (Emphasis added.)

However, unlike 803(6), §3505 does not require that authenticity be attested to by the custodian of the records and it is in this that the statute offends both the Confrontation Clause and runs afoul of the requirement that exceptions to hearsay contain "indicia of reliability" which may satisfy the fact finder of their trustworthiness. Rule 803(6) permits that requisite finding of trustworthiness through the testimony of the custodian of records whose recollection and accuracy can be tested through cross-examination:

> The mechanism by which the trustworthiness of a particular record or particular records is tested is through the general foundation requirements of the rule: 'Records of regularly conducted activity are not . . . self-proving as public records may be . . . . The testimony of the custodian or other qualified witness who can explain the record keeping of his organization is . . . essential.'

Brenner, *The Revival of "Trial by Affidavit": 18 U.S.C. §3505 and the Requirements of the Confrontation Clause,* 41 Ark.L.Rev. 323, 333-34 (1988), quoting for J. Weinstein, *Weinstein's Evidence,* ¶803(6) [02] (1985) (note omitted).

Section 3505, in permitting authentication by a certification, which was prepared specifically for the criminal prosecution, revives what the Sixth Amendment traditionally abhors: trial by affidavit (*see, California v. Green*, 399 U.S. 149, 156 (1970): "It is sufficient to note that the particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact.").

Without the testimony of a witness who can speak knowledgeably as to the record keeping procedures, the defendant is at a loss to test the accuracy of those records or otherwise persuade

the Court that they do not have the guarantees of trustworthiness which would permit their introduction as an exception to the hearsay rule or satisfy the demands of the Confrontation Clause (*see*, e.g., *United States v. Maher*, 801 F.2d 1477, 1493 (6th Cir. 1986): absence of any testimony by someone with personal knowledge of record keeping practices and circumstances clearly establishes that business records exception of 803(6) not satisfied).

As pointed out by legal commentator Brenner, the substitute of the written certification of §3505 not only dispenses with the opportunity for cross-examination but it actually predicates the admissibility of foreign records on inadmissible hearsay. The certification executed under §3505 is a written assertion not made by the declarant while testifying at trial and which is offered in evidence to prove the truth of the matter asserted — that certain foreign records were executed in accordance with the factors delineated in §3505(a)(1):

> Therefore, §3505 'certifications' are a form of hearsay; and because they do not fall with any of the recognized exceptions to the hearsay rule contained in Rules 802(1)-(23) or in Rule 804, they constitute hearsay which is inadmissible under Rule 802 and under the Confrontation Clause.

Brenner, 41 Ark.L.Rev. at 357-358.

The use of untested hearsay, which falls within no exception to the hearsay rule, as the medium by which substantive evidence of guilt is admitted at trial, constitutes "the undisputed prohibition of the Confrontation Clause: trial by *ex parte* affidavit or inquisition." *Maryland v. Craig*, 110 S.Ct. 3157, 3166 (1990).

The rationale whereby business records are considered an appropriate exception to the hearsay rule is that the regularity with which such records are made attests to their accuracy. However,

when a criminal defendant is not allowed to test that assumption of regularity, as required under the federal rules, the rationale for their hearsay admission is eviscerated and the "indicia of reliability" which characterize the hearsay are thereby non-existent. 18 U.S.C. §3505 sanctions such a result and in a case such as that at bar, where an essential portion of the Government's case rested upon the production and admission of bank records through this untested statute of questionable constitutionality, petitioner submits that this Court should determine whether the legislation passes constitutional muster.

CONCLUSION

For the reasons stated above, certiorari should be granted.

DATED: March 22, 1992

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APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 90-3147/3148/3151/3750

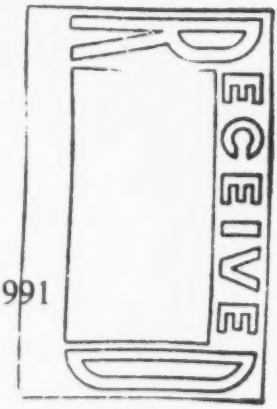
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID A. STURMAN (90-3147);
RALPH L. LEVINE (90-3148);
REUBEN STURMAN (90-3151);
and MELVIN KAMINSKY
(90-3750),
Defendants-Appellants.

ON APPEAL from the United States District Court for the Northern District of Ohio



Decided and Filed October 24, 1991

Before: KENNEDY and MILBURN, Circuit Judges; and WILHOIT, District Judge.*

KENNEDY, Circuit Judge.

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*The Honorable Henry R. Wilhoit, Jr., United States District Court for the Eastern District of Kentucky, sitting by designation.

I. STATEMENT OF FACTS

On June 25, 1987, the defendants were charged with one count of conspiring to defraud the United States by impeding governmental functions. Reuben Sturman was also indicted on counts of attempted tax evasion, filing false income tax returns, willfully failing to maintain records and file reports, and one count of endeavoring to obstruct justice. Following their conviction, Reuben Sturman was sentenced to 10 years imprisonment, fined approximately $2.5 million, and ordered to pay prosecution costs. The other defendants were sentenced to shorter terms and fined lesser amounts.

Reuben Sturman engaged in the production, sale, and distribution of sexually explicit books and tapes. Some of the individual businesses ran "peep booths" which played sexually explicit videos. David Sturman, Reuben Sturman's son, was responsible for his father's businesses in the San Francisco area. Ralph Levine ran the businesses in Nevada and Melvin Kaminsky managed Reuben Sturman's principal business, Sovereign News Company.

The defendants, led by Reuben Sturman, created 150 domestic corporations beginning in the 1960s. Reuben Sturman also formed five foreign corporations in countries following strict "corporate secrecy" policies. The testimony of numerous witnesses revealed that the named shareholders and nominees in these corporations were often fictitious. In other cases, real people were listed as shareholders, but their names and signatures had been used without their knowledge or permission. The prosecution proved that, in fact, Reuben Sturman was the beneficial owner of most of the corporations.

The defendants used the corporations to conceal income. They transferred money between corporations in ways that made tracing income and expenses difficult. The defendants also skimmed money from some of the adult entertainment businesses. This money was then

used to pay personal expenses or was transferred and deposited in Swiss bank accounts. These bank accounts were opened in 1974, as stated by Reuben Sturman, to "conceal his money" and "avoid taxes." (Testimony of Walter Butti, Alfred Graf and James Olsafsky.) The transfers to Switzerland were accomplished through a series of transactions involving both the foreign and domestic corporations.

Reuben Sturman took a variety of steps to conceal his activities from the authorities. A federal investigation in 1975 forced him to begin hiding documents. In 1979, following the issuance of subpoenas calling for various records, Reuben Sturman destroyed or hid many of the requested records. He took similar actions in response to a 1982 grand jury subpoena.

Tax records filed during the period of the conspiracy contained numerous false statements and inaccuracies. Reuben Sturman failed to report his ownership in the domestic and foreign corporations or his signature authority over foreign bank accounts. His tax returns for 1978-1982 underreported $2,735,713 in individual income. The other defendants also failed to report their signature authority in foreign accounts.

II. DENIAL OF DEFENDANTS' MOTIONS TO DISMISS COUNT I

All defendants filed motions to dismiss Count I which charged that the defendants,

> did unlawfully, knowingly and willfully conspire, combine, confederate and agree together and with each other to defraud the United States of America by hampering, hindering, impeding, impairing, obstructing and defeating the lawful Governmental functions of the Internal Revenue Service of the Treasury Department of the United States in the ascertainment, computation, assessment and collection of income taxes [in violation of 18

U.S.C. § 371.]

Defendants based their motions on this Court's decision in *United States v. Minarik*, 875 F.2d 1186 (6th Cir. 1989), which held that conspiracy to commit an offense and conspiracy to defraud, under 18 U.S.C. § 371, were two separate crimes. The District Court denied the defendants' motions holding that *Minarik* was inapplicable to the conspiracy charged in this case. We agree.

Count I of the indictment is based on 18 U.S.C. § 371 (1984) which states,

> [i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Count I charges the defendants under the defraud clause of the statute. This type of conspiracy is generally known as a "Klein" conspiracy. *See United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958). In *Klein*, several persons were charged with defrauding the United States by impeding and obstructing the lawful functions of the Treasury Department and concealing the nature of their business activities and source of income. As in this case, "the indictment [was] framed to make a general charge of impeding and obstructing the Treasury Department . . . [with more specific allegations] as particular instances, rather than as substitute and complete allegations of the substantive crime itself." *Klein*, 247 F.2d at 916. The conspiracy in *Klein* also involved a large number of domestic and foreign corporations, and multiple violations of the tax laws.

In *Minarik*, 875 F.2d at 1186, this Court addressed the

two clauses of the conspiracy statute. One of the defendants in that case, Aline Campbell, had been issued three tax assessments for a total demand of $108,788.15. Campbell responded that she did not owe a tax. Shortly after the tax assessment, Campbell, together with her friend Robert Minarik, arranged for the sale of a house Campbell owned. The $47,500 payment was made in the form of seven checks for $4,900 and one check for $3,732.18. The buyer assumed a mortgage for the balance. When Campbell cashed two of the checks at the same bank, the IRS was contacted. The IRS agents obtained a warrant to search Campbell's car because she had attempted to avoid the Bank Secrecy Act which requires the filing of an IRS report for any transaction over $10,000. The defendants were charged with conspiring to defraud the government by concealing the nature of and income from Campbell's business affairs in violation of 18 U.S.C. § 371. The indictment did not make clear what function of the Treasury Department the defendants were impeding and the government changed its theory of the case throughout the indictment process and trial. The defendants could have been charged properly under section 7206(4) of the Internal Revenue Code which makes it a felony to conceal any goods or commodities on which a tax or levy has been imposed.

This Court held that defendants could not be charged under the defraud clause but convicted on evidence which supports the offense clause. In *Minarik*, the Court interpreted section 371 finding:

> the "offense" and "defraud" clauses as applied to the facts of this case are mutually exclusive, and the facts proved constitute only a conspiracy under the offense clause to violate 26 U.S.C. § 7206(4)
>
> . . . .

875 F.2d at 1187. The Court concluded that when Congress creates a specific offense out of conduct which was previously criminalized only if it took the shape of a conspiracy to defraud the United States, the court should

require that a criminal conspiracy regarding that conduct be brought exclusively under the offense clause. *Id.* at 1194. Thus, if the offense clause covers an act or offense, a person cannot alternatively be convicted under the broad defraud clause. This rule comes into effect most often when a Congressional statute closely defines the duties a defendant is accused of violating. The Court reasoned that requiring an indictment to charge a defendant with conspiracy to commit a specific crime reduces the uncertainty in a case by defining up front the alleged crime.

Defendants here argue that the conduct alleged in Count I amounted to a violation of either 26 U.S.C. §§ 7206(1) or 7206(4) and that the conspiracy should have been charged under the offense clause of section 371. We disagree. The conspiracy alleged and proven here was broader than a violation of a specific statute.

This Court, in *Minarik*, noted that the holding in the case referred to the offense and defraud clauses "as applied to the facts in this case." 875 F.2d at 1187. The facts in *Minarik* and this case are distinguishable. Reuben Sturman set up a complex system of foreign and domestic organizations, transactions among the corporations, and foreign bank accounts to prevent the IRS from performing its auditing and assessment functions. Evidence shows that he committed a wide variety of income tax violations and engaged in numerous acts to conceal income. This large conspiracy involved many events which were intended to make the IRS impotent. No provision of the Tax Code covers the totality and scope of the conspiracy. This was not a conspiracy to violate specific provisions of the Tax Code but one to prevent the IRS from ever being able to enforce the Code against the defendants. Only the defraud clause can adequately cover all the nuances of a conspiracy of the magnitude this case addresses. As the Supreme Court had held with respect to specific violations within a conspiracy, "[t]he fact that the events include the filing of false statements does not, in and of itself, make the conspiracy-to-defraud clause of § 371 unavailable to

the prosecution." *Dennis v. United States*, 384 U.S. 855, 863-64 (1966). In this case, the prosecution was entitled to indict the defendants under the defraud clause.[1] The broad nature of the conspiracy, and the associated violation of several statutes, distinguishes this case from *Minarik*. In this case, the alleged conduct violates several statutes. A "conspiracy to defraud" charge most clearly covers the conduct when viewed in its entirety.

The chief concern of this Court in *Minarik* was that the government, by constantly changing the prosecution theory, never adequately informed the defendant of the charges against him. In this case, no such changing theories have emerged. The prosecution has presented the case clearly and no confusion as to the charges is evident.

III. INSUFFICIENT EVIDENCE CLAIMS OF DAVID STURMAN AND RALPH LEVINE

A. David A. Sturman

David Sturman asserts that the prosecution produced insufficient evidence to support his conviction. He specifically points to a lack of proof evidencing his participation in a conspiracy or of the formation of a willful conspiracy.

A conviction withstands a sufficiency of evidence challenge if

> after viewing the evidence in the light most favorable to the government and drawing all reasonable inferences in the government's favor,

---

[1]The government's brief cites four cases in which the Sixth Circuit has affirmed convictions based on the defraud clause. These defendants could also have been charged based on the offense clause. These decisions lend support to limiting *Minarik* to its facts. *See United States v. Jerkins*, 871 F.2d 598 (6th Cir. 1989); *United States v. Shermetaro*, 625 F.2d 104 (6th Cir. 1980); *United States v. Fruehauf Corp.*, 577 F.2d 1038 (6th Cir.), *cert. denied*, 439 U.S. 95 (1978); *United States v. Levinson*, 405 F.2d 971 (6th Cir. 1968), *cert. denied*, 395 U.S. 958 (1969).

> the evidence is sufficient to justify a reasonable juror's conclusion that each element of the offense has been established beyond a reasonable doubt . . . .

United States v. Poulos, 895 F.2d 1113, 1117 (6th Cir. 1990) (citations omitted). When attempting to prove an individual's participation in a conspiracy, the prosecution must first establish that a conspiracy existed. This Court stated the elements necessary for proof of conspiracy under 18 U.S.C. § 371 in *United States v. Meyers*, 646 F.2d 1142 (6th Cir. 1981):

> The essential elements of conspiracy are: (1) that the conspiracy described in the indictment was willfully formed, and was existing at or about the time alleged; (2) that the accused willfully became a member of the conspiracy; (3) that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, at or about the time and place alleged; and (4) that such overt act was knowingly done in furtherance of some object or purpose of the conspiracy as charged.

Id. at 1143-44. The existence of a conspiracy can be inferred from circumstantial evidence. *United States v. Levinson*, 405 F.2d 971 (6th Cir. 1968), *cert. denied*, 395 U.S. 958 (1969). Once a conspiracy has been established, the prosecution need only produce slight evidence to implicate the defendant. *Poulos*, 895 F.2d at 1117.

Extensive evidence was submitted at trial to establish the existence of a conspiracy. Evidence against David Sturman included his admission that he had opened two Swiss bank accounts under assumed names, his signature authority over 20 additional accounts under the names of various fictitious persons, his directorship at one of the corporations used to channel money from other businesses, and his failure to report his signature authority

over Swiss accounts as required by law. All of these activities were interrelated to his father's overall activities. His father's secretary and accountant were also active in the overall scheme. This evidence is adequate to prove the existence of a conspiracy. The testimony of various witnesses, the signature cards with David Sturman's name, and his own admissions implicate the defendant. The jury reasonably could have inferred from the evidence that David Sturman knew of the conspiracy, willfully became a member of the conspiracy, and participated in the concealment of assets from the IRS. This Court finds that a reasonable jury could find the evidence adequate to implicate the defendant and support his conviction and therefore affirms the District Court findings.

B. Ralph L. Levine

Levine argues there is insufficient evidence of any agreement on his part to become a member of the conspiracy, and that even if he did so agree, it was to a different conspiracy then the one alleged. For this Court to sustain a conviction of conspiracy,

> the defendant must know the purpose of the conspiracy, but not necessarily the full scope thereof, the detailed plans, operation, membership, or even the purpose of other members in the conspiracy.

United States v. Shermetaro, 625 F.2d 104, 108 (6th Cir. 1980). Further, the Court is bound by "all reasonable inferences and credibility choices in support of the jury's verdict." *United States v. Hughes*, 895 F.2d 1135, 1140 (6th Cir. 1990) (quoting *United States v. Stull*, 743 F.2d 439, 442 (6th Cir. 1984)).

As Levine concedes, Reuben Sturman conspired to defraud the government by creating numerous and complex means of concealing assets and income. Levine, who acted as a partner to Sturman, ran the Nevada

businesses. An employee, Jack Marcum, testified that at least $70,000 in cash from the Nevada businesses went unrecorded every month. Levine failed to report the existence or use of this money and therefore furthered the purpose of the conspiracy. His signature authority and power of attorney on Swiss accounts, his failure to report such authority, and the signing of aliases on the signature cards provides further evidence from which the jury could imply willing membership. Levine argues that any finding that he participated in the conspiracy can only be based on inference piled on inference in violation of *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943). This Court finds the evidence presented adequate to find participation in a conspiracy even without multiplying inferences. A reasonable jury could find the evidence sufficient to convict the defendant.

IV. SINGLE VERSUS MULTIPLE CONSPIRACIES AND JOINDER OF CLAIMS

Levine and David Sturman both contend that the evidence establishes the existence of multiple conspiracies rather than only one large conspiracy. Levine also asserts that the District Court abused its discretion when it denied his motion for severance. The motion, based on Federal Rules of Criminal Procedure 14, claimed prejudice by the joinder of defendants at trial. Defendants have failed to preserve either of these issues.

At the end of trial, both Levine and David Sturman requested jury instructions on multiple conspiracies. The district judge declined to give the multiple conspiracy instruction and several other instructions requested by the defense. After the jury was instructed, Reuben Sturman's attorney, J. Michael Murray, raised a general objection "to the failure with respect to any of the jury instructions that have not been included." He then mentioned several specific instructions, by number, which he believed expressed a correct statement of law and were necessary to present a balanced statement of the case to the jury and potential defenses. Mr. Murray did not mention, even by

number, the instruction addressing multiple conspiracies and gave no distinct reasons for objecting to the court's failure to include the multiple conspiracy instruction.

A general objection to district court jury instructions is insufficient to preserve a specific claim. Fed. R. Crim. P. 30 states:

> No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection.

This rule clearly indicates that a specific objection must be made with regard to charge requests. *See United States v. Friedman*, 854 F.2d 535, 555 (2d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989); *United States v. Martinez*, 776 F.2d 1481, 1484 (10th Cir. 1985) (holding that the objection "both instructions fit this case and should be given" is inadequate to preserve issue). The defendants in this case have failed to preserve the issue of multiple conspiracies for appeal.

Levine's contention that the District Court abused its discretion by denying his motion for severance is also without merit. Levine made several motions based on Rule 14 of the Federal Rules of Criminal Procedure. Rule 14 allows the trial court to grant a severance if it appears that a defendant is prejudiced by a joinder of offenses or defendants. Levine argued that the evidence against the co-defendants unfairly accrued to him and that no cautionary instruction could eradicate that accrual.

Levine has failed to preserve this claim for appeal. This Court has held that "a severance motion will be deemed waived if it is not renewed at the end of the evidence." *United States v. Swift*, 809 F.2d 320, 323 (6th Cir. 1987). Although Levine argued that he was entitled to a judgment of acquittal under Federal Rule of Criminal Procedure 29 because of the prosecution's failure to prove

one conspiracy, he did not renew his motion for severance.

Even if Levine had preserved this claim, it is without merit. The Supreme Court articulated a test for denial of severance motions in *Kotteakos v. United States*, 328 U.S. 750 (1946). Succinctly, the test is whether the error had substantial influence on the judgment. *Id.* at 765. A denial of a severance motion is reversed only if there is abuse of discretion by the trial court. *United States v. Bibby*, 752 F.2d 1116 (6th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986). No abuse of discretion is apparent in this case. The District Court made repeated instructions to the jury to consider the evidence against each defendant separately. A jury is presumed capable of sorting and considering evidence separately. *Swift*, 809 F.2d at 323. In addition, much of the evidence in the trial would have been admissible if Levine had a separate trial. This Court finds no basis for reversing the District Court's denial of severance.

V. WILLFULNESS ELEMENT OF COUNTS XII-XV

Counts XII-XV charged Reuben Sturman with willfully failing to maintain records and file reports as required by 31 U.S.C. § 5314 (1982). The statute governs records and reports on foreign financial agency transactions. The government based these counts on Reuben Sturman's failure to file Form 90-22.1. This form must be filed by any person who has an interest in or signature over a foreign bank account with a balance in excess of a set dollar amount. Reuben Sturman objects to his conviction on these counts because he believes that the prosecution failed to show that he was aware of the Form 90-22.1 filing requirements.

In *Cheek v. United States*, 111 S. Ct. 604, 610 (1991), the Supreme Court established that the test for statutory willfulness is "voluntary, intentional violation of a known legal duty." Willfulness may be proven through

inference from conduct meant to conceal or mislead sources of income or other financial information. *Spies v. United States*, 317 U.S. 492, 499 (1943).[2] Other circuit courts have concluded that willfulness can be inferred from a conscious effort to avoid learning about reporting requirements. *United States v. Bank of New England, N.A.*, 821 F.2d 844, 855 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987).

The evidence in this case establishes that Reuben Sturman did take actions to conceal his assets from the federal government. He concealed his signature authority, his interests in various transactions, and his interest in corporations transferring cash to foreign banks. This conduct could be adequate for the jury to infer willfulness on the part of the defendant. In addition, the defendant did admit knowledge of and failure to answer a question concerning signature authority at foreign banks on Schedule B of his income tax return. This section of the return refers taxpayers to a booklet that further outlines their responsibilities for reporting foreign bank transactions. This booklet discusses the duty to file Form 90-22.1. These resources indicate that the defendant could have learned of the additional requirements quite easily. It is reasonable to assume that a person who has foreign bank accounts would read the information specified by the government in tax forms. Evidence of acts to conceal income and financial information, combined with the defendant's failure to pursue knowledge of further reporting requirements as suggested on Schedule B, provide a sufficient basis to establish willfulness on the part of the defendant.

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[2]The defendant claims that *Spies* is irrelevant since it deals with specific charges of tax evasion rather than conspiracy to defraud the government. I would argue that the case is relevant. *Spies* did involve an indictment which contained a single felony charge of willfully attempting to defeat and evade a tax. However, willful failure to fil : return and willful failure to pay taxes were cited as means to the end. 317 U.S. at 494.

VI. OBJECTIONS TO PROSECUTORIAL SUMMATION

Defendant Levine contends that statements by the prosecutor in his rebuttal argument deprived him of a fair trial and that the District Court abused its discretion when it denied his motion for mistrial based on the statements. Levine's attorney argued in summation that the prosecution had failed to produce any evidence which linked Levine to the purchase, sale, transfer of funds into or out of Swiss accounts. In response, the prosecution referred to cashiers checks from Nevada banks which had been deposited in Switzerland. The inference was that these checks established that money from sales in Nevada, where Levine managed Sturman's businesses, had been moved into foreign banks. Levine asserts that since no direct or concrete evidence was produced to link him with those foreign bank transactions, the prosecutor's remarks were prejudicial and improperly suggested an unsupported inference.

Alleged prosecutorial prejudicial or biased remarks will warrant reversal only if the comments have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *United States v. Moreno*, 899 F.2d 465, 468 (6th Cir. 1990) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). In this case, evidence did exist that suggested Levine had participated in the skimming and transfer of money from United States corporations to Swiss accounts. This evidence included Levine's signature on signature cards and the testimony of various witnesses. This evidence is adequate to support any inference by the jury that deposits to the Swiss accounts from Nevada reflects proceeds from the skimming of income in which Levine was involved. In addition, the jury was instructed that the arguments of the attorneys should be dismissed to the extent they were unsupported by the evidence. This Court finds Levine's guilt supported by the evidence and that the prosecution's summary argument did not "infect[ ] the trial with unfairness."

VII. ALLEGED BIAS OF A JUROR

Levine contends that he has been denied the right to a fair trial because the District Court failed to accord the defendant a hearing based on the defendant's claims of juror bias. This Court has held that,

> [s]ince the trial judge is in the best position to determine the nature and extent of alleged jury misconduct, his decision on the scope of proceedings necessary to discover misconduct is reviewed only for an abuse of discretion.

United States v. Shackleford, 777 F.2d 1141, 1145 (6th Cir. 1985), *cert. denied*, 476 U.S. 1119 (1986). The Supreme Court, in *Remmer v. United States*, 347 U.S. 227, 230 (1954), required a hearing in cases of jury bias to "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate."[3]

During the course of this trial, Juror Olenik approached Judge White with concerns related to Levine's drawing pictures of the jurors during the trial. She advised the judge that some of the other jurors were also uncomfortable. When questioned, several of the jurors admitted being anxious over the drawings and their appropriateness. The judge assured the jurors that drawings by the defendants were permitted. He also told Juror Olenik that the drawings did not resemble any of the jurors. The judge asked each juror whether the incident would have any impact on their ability to remain fair and

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[3]*Remmer* involved a case of jury tampering by outside influences. After the completion of the trial, it was revealed that a juror had been approached by someone who suggested it would be profitable to bring in a verdict favorable to the petitioner. The judge had ordered an investigation at the time the juror had reported the incident, decided the offer had been made in jest, and never notified the defense of the incident. The defense learned of the occurrence after the trial in the newspaper. 347 U.S. at 228.

impartial. All the jurors responded negatively. Although the judge asked the jurors the questions originally requested by defense counsel, he denied defense requests for additional questioning. He did not allow the defense attorneys to ask any questions directly to the jury.

This Court has articulated four points to be considered when determining jury impartiality. *United States v. Zelinka*, 862 F.2d 92 (6th Cir. 1988). First, a hearing must be held. Second, the defendant bears the burden of proving bias. Third, no presumption of prejudice arises from the "contact." And finally, fourth, juror testimony at the hearing to determine juror bias is not inherently suspect. Although no case since *Remmer* has addressed the right of the defense to question jurors, such questioning would normally be important to the defense in its effort to prove bias. However, when the questioning of the jurors occurs during the trial it is preferable it be done by the judge. Jurors may resent being questioned directly by counsel.

Even if direct questioning of the jurors by the defense is required by *Remmer*, the absence of such questioning in this case is harmless error. Each juror was asked separately what had occurred and its impact on them. The juror who approached the court about the issue appeared mainly concerned with whether the defendant's drawings were permissible. The court adequately assured the jurors that Levine had done nothing improper. The judge was justified in taking at face value the jurors' assurances of impartiality. This Court finds that any deficiencies in the juror bias hearing were harmless error and the defendant was not entitled to a mistrial.

VIII. ADEQUACY OF 18 U.S.C. § 1503 ALLEGATION

Count XVI of the indictment charged Reuben Sturman with obstruction of justice in violation of 18 U.S.C.

§ 1503.[4] The count alleged that Reuben Sturman concealed or suppressed documents of various corporations which had been subpoenaed by the grand jury. Reuben Sturman argues that the charge did not provide sufficient information on the specific documents alleged destroyed or the particular corporations or subpoenas involved.

The Supreme Court has held that the fifth amendment indictment clause and the sixth amendment notice clause, as protected in Federal Rule of Criminal Procedure 7(c), require an inquiry to determine:

> first, whether the indictment "contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet,'" and, secondly, "'in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.'"

Russell v. United States, 369 U.S. 749, 763-64 (1962) (citations omitted). Furnishing the defendant with a bill of particulars fails to save deficiencies in the indictment. *Id.* at 769-70. This Court, when reviewing the sufficiency of an indictment, must ask whether the omission complained of deprives the defendant of one of the protections which the guaranty of a grand jury indictment was meant to ensure. *Id.* at 763.

Count XVI of the indictment charges Reuben Sturman with endeavoring to obstruct justice in January 1982 in the United States District Court by destroying, concealing,

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[4] 18 U.S.C. § 1503 (1984) states, in relevant part, that whoever,

> corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

and suppressing records of various corporations. The indictment clearly establishes the date and manner of the offense as well as the administrative body affected by the actions. This information sets forth all the elements necessary to establish and give a general description of the offense. Any technical deficiencies were harmless error since the indictment sufficiently apprised the defendant of the charges against him to enable him to prepare a response. *See United States v. Weiss*, 491 F.2d 460 (2d Cir.), *cert. denied*, 419 U.S. 833 (1974). The District Court correctly dismissed Reuben Sturman's motion to dismiss the charge.

IX. ADMISSION OF JAMES OLSAFSKY'S TESTIMONY

James Olsafsky was the government's key witness with respect to Count XVI of the indictment charging Reuben Sturman with destroying or concealing subpoenaed documents. Olsafsky handled the bookkeeping for fifteen to twenty of the stores owned by Reuben Sturman. Olsafsky testified that he was directed by Reuben Sturman to destroy numerous documents subject to a grand jury subpoena. The documents ordered destroyed included all records of corporations then in existence which contained the name of a living person. Records of defunct corporations were not destroyed. During examination of Olsafsky, the government requested that he flip through the file of a defunct corporation and identify what records he would have destroyed seven years previously if he had been asked by Reuben Sturman. The defense asserts that it is prejudicial error to allow a key witness to speculate on what documents he might have destroyed, and to bolster witness testimony with a demonstration of document destruction. They assert they are denied the right to cross-examine since the testimony was not based in fact.

District court decisions relating to the admission of testimony may not be reversed unless the defendant proves abuse of discretion and specific prejudice.

Admissibility of evidence is measured by weighing the probative value of the evidence against its prejudicial value. *United States v. Zipkin*, 729 F.2d 384, 389-90 (6th Cir. 1984). The testimony to which Reuben Sturman objects merely serves to identify the types of documents Olsafsky was ordered to destroy. Since Olsafsky did in fact destroy documents, the use of a similar file to identify the type of destroyed documents is based on personal knowledge. The court was within its discretion in permitting the demonstration. Any prejudice would be outweighed by the probative value of Olsafsky's identification of the types of documents Reuben Sturman ordered destroyed.

X. ADMISSION OF EXPERT TESTIMONY

Reuben Sturman objects to the summary testimony of Internal Revenue Agent James Morrow who was involved in the investigation of this case. Reuben Sturman asserts that Morrow's summary testimony was in fact a final argument to the jury, recounting unproven and contested facts. The defendant argues that permitting Morrow's testimony constitutes prejudicial error and requires a reversal of convictions.

Reuben Sturman relies on a Second Circuit case which held that witness credibility is for determination by the jury and that one witness cannot comment on the credibility of another witness. *United State v. Scop*, 846 F.2d 135, 142, *modified on reh'g*, 856 F.2d 5 (2d. Cir. 1988). Agent Morrow, using charts, summarized the evidence and testified that the evidence showed a connection between the defendants, Swiss bank accounts, and a failure to report signature authority and income. Agent Morrow did not comment directly on any specific witness' credibility but rather gave his view of the events. The summary testimony was neither inflammatory nor prejudicial, the District Court properly instructed the jury on the elements of each count charged, and Agent Morrow's testimony and charts aided the jury in organizing the proof presented.

The admission of testimony summarizing evidence has been held to be admissible in income tax prosecutions. *United States v. Lattus*, 512 F.2d 352, 353 (6th Cir. 1975). This Court has allowed such testimony in criminal trials when the judge charges the jury as to all the elements necessary for conviction, where the summary is intended to aid the jury in organizing proof, and where the summary is not inflammatory or prejudicially worded. *United States v. Scales*, 594 F.2d 558, 562 (6th Cir.), *cert. denied*, 441 U.S. 946 (1979). We find that under this standard the District Court properly admitted the testimony.

XI. ADMISSION OF FOREIGN DEPOSITIONS

Reuben and David Sturman both contend that the depositions taken of four Swiss bank officials in Switzerland did not comply with Federal Rule of Criminal Procedure 15. Rule 15(d) provides:

> Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that . . . the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself.

The defendants claim that the admission of the depositions at trial violated their rights to due process, confrontation and effective assistance of counsel.

Depositions of four Swiss bank officials were taken in Switzerland prior to trial. These depositions were presided over by a Swiss magistrate, Benedikt Holdener. Magistrate Holdener had aided the United States in the investigation and prosecution of the defendants. During the depositions, Holdener instructed the defendants to register any objections to the proceeding in writing. He disallowed verbatim transcription. Instead, Holdener dictated a summary of each question and response and

noted objections either contemporaneously or required them to be submitted later in writing. Witnesses were given the opportunity to read the summaries and then sign them. During the trial in this case, the English translation of a portion of these depositions was read into the record.

A. Failure to Comply with Fed. R. Crim. P. 15

The District Court overruled the defendants' objections to the foreign depositions finding,

> that the defendants were entitled to be present there, they were entitled to have counsel there, counsel for the government was entitled to have questions read, and it appears to me that counsel for the defendants were entitled to submit questions to the magistrate for answers by the witnesses.

Under a test articulated by the Second Circuit, these procedural safeguards support allowance of the depositions despite variations from United States procedures. The Second Circuit held that a foreign deposition would be admissible,

> unless the manner of examination required by the law of the host nation is so incompatible with our fundamental principles of fairness or so prone to inaccuracy or bias as to render the testimony inherently unreliable . . . .

United States v. Salim, 855 F.2d 944, 953 (2d Cir. 1988). Swiss law forbids verbatim transcription so the summary method of establishing the record was the most effective legal method. All defense questions, with just one exception, were submitted to the witnesses so that objections and determinations on admissibility could be litigated later.[5] Although the witnesses were not given an

[5]It should be noted that only Reuben Sturman exercised his cross-examination rights. The other defendants are presumed to have waived their rights to cross-examination. The one question rejected

oath, defense conceded that each witness was told the penalties for giving false testimony. The Second Circuit has recognized that an oath may not be given in some foreign countries and that the omission of such an oath does not automatically result in the suppression of the deposition. *See United States v. Casamento*, 887 F.2d 1141, 1172-75 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1138 (1990). Cross-examination, acceptance and consideration of objections, and the review of all written testimony by the witnesses ensured that the testimony complied with Rule 15(d) to the extent possible. Depositions taken in foreign countries cannot at all times completely emulate the United States' method of obtaining testimony. Here, all steps were taken to ensure the defendants' rights while respecting the legal rules established in a different country. The District Court achieved substantial compliance with Federal Rule of Criminal Procedure 15.

The same factors which demonstrate substantial compliance with Rule 15 rebut any claims based on due process violations or interference with effective assistance of counsel. The ability of the defendants to cross-examine, and the admission of all defense questions, protected the defendants against the constitutional violations alleged. Defendants have failed to point to any way in which they were prejudiced by the procedures used.

B. Neutrality or Impartiality of the Magistrate

David and Reuben Sturman also object to Magistrate Holdener presiding over the depositions asserting that he was not neutral because of his role in the prosecutions. Holdener himself overruled the objection. Neither Rule 15 nor Federal Rule of Civil Procedure 28(b) address the issue of neutral or impartial magistrates. Instead, these rules accept the necessity of foreign officials presiding over foreign depositions. If the law of Switzerland

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by Holdener concerned the salary of one of the witnesses.

permits a person to serve as both magistrate and prosecuting attorney, then that practice must be permissible in obtaining depositions for United States litigation provided that the criteria in *Salim* are met. The defendants have failed to establish evidence that Magistrate Holdener's handling of the deposition unfairly prejudiced the defendants or that the testimony could be considered unreliable. The defendants were provided sufficient opportunity to ask questions designed to refute the credibility of the witnesses. The admission into evidence of the depositions did not violate any constitutional rights of the defendants and did not constitute unfair prejudice.

C. Pierre Perrelet's Identification

The defense also objects to Pierre Perrelet's identification of defendant Reuben Sturman. Perrelet was asked to identify his former customer. He responded by stating, "[p]resumably the second gentlemen at the left side of the table in second place who is leaning on a briefcase is a customer of SBC whom I looked after in the past." This description identified Reuben Sturman. Defense seeks a reversal of Reuben Sturman's convictions since this identification was based on a presumption. From the context in which the word "presumably" was used, it seems sufficiently clear that the witness was identifying the defendant and the "presumably" was merely a euphemism.

XII. DISQUALIFICATION OF DISTRICT JUDGE

Reuben Sturman argues that the district judge in this case was under a duty to *sua sponte* recuse himself because of his bias against the defendants. After pronouncing the sentence and judgment, the judge requested the defendants and their attorneys to approach the bench. He then stated that he had had to separate his feelings about the defendants' had business from the defendants in imposing the sentence. He concluded, however, by noting that he had tried his best to keep his

feelings about the type of business in which the defendants were engaged out of the sentencing and believed he had succeeded.[6]

Reuben Sturman argues that the judge's comments indicate a bias which effected the entire four-month trial and previous years of motions and discretionary rulings. The defendant asserts that because the judge failed to recuse himself at the outset of the case, the convictions in the case must be reversed.

A federal judge is required to recuse himself "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). This Circuit has determined that whenever a judge's impartiality is questioned, it must be determined whether "a reasonable, objective person, knowing all the circumstances, would not have questioned [the judge's] impartiality." *Hughes v. United States*, 899 F.2d 1495, 1501 (6th Cir.), *cert. denied*, 111 S. Ct. 508 (1990); *see also* H.R. Rep. No.

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[6]The transcription of the judge's comments reads in part:

> I have gone out of my way, very frankly, as a judge to separate in my mind the business that the defendants are in from what they are charged with.
>
> . . .
>
> However, it is this Court's feeling that even thought [sic] the defendants are suffering and have gone through an ordeal, I can't help but think that having seen many movies that depicted certain scenes, that probably the gentleman involved in selling, first of all, it runs through my mind that somebody has to be paid to appear in those scenes.
>
> Quite frankly, I have to believe that some people who have acted in those scenes have gone through some tremendous pressures of their own.
>
> . . .
>
> I had to say that. I have tried my best to, and I think I have in keeping that from involving the sentence in this case. I have tried to limit it to the tax matters in this case and the conspiracy that was alleged and the other charges in this case which have nothing to do with -- indirectly it may with the business -- but should not involve my thinking in the sentences.

1453, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S. Code Cong. & Admin. News 6351, 6354.

Under the test established in *Hughes*, this Court must look at all the circumstances surrounding the case to determine whether a reasonable person would believe the judge was impartial. Several factors support a finding that Judge White acted impartially during the trial. First, the defendants can point to no decision on the part of the judge that clearly demonstrated bias. The contentions in the appeal that raise abuse of discretion issues have been found to be without merit. Second, the sentences given the defendants, rather than exhibiting bias against the defendants, are substantially below the level requested by the government and appear fair under the circumstances. Third, this Court may take at face value Judge White's assertion that he set his feelings about the defendants' business aside. Judges, whether they are hearing tax evasion cases or vicious murder prosecutions, may have views about the nature and heinousness of the underlying crime. All judges, as part of their decisionmaking process, seek to set these feelings aside. Judge White merely articulated a tension all judges share. This Court holds that the defendants have failed to prove that Judge White's personal beliefs concerning pornography tainted the proceedings.[7]

XIII. VIOLATIONS OF THE MUTUAL ASSISTANCE TREATY

Reuben and David Sturman both raise objections to the use of records obtained from Switzerland under the Treaty Between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 209, T.I.A.S. 8302. The Treaty ("Treaty") states that Switzerland agrees to provide information and access to

[7]No motion for recusal was filed with the District Court. Indeed, defense counsel c ıplimented the district judge at this same sentencing hearing on his fairness in presiding over the case.

bank records in Switzerland only for a specifically defined list of criminal offenses. Reuben Sturman asserts that the United States government submitted false information concerning the defendant's connection with organized crime in order to obtain his records under the Treaty. He claims that these submissions and the resultant release of records violated his fourth amendment privacy and fifth amendment due process rights. David Sturman objects to the use of the records obtained under the Treaty provisions in the case against him since the government did not provide evidence to Switzerland concerning David Sturman when they sought the records.

The United States requested assistance from the government in Switzerland in obtaining the bank records of Reuben Sturman. In acquiring these records, the United States government must submit evidence to Switzerland that shows the requested records relate to one of a select list of criminal offenses. The United States government submitted evidence to Switzerland which indicated that Reuben Sturman had some relationship to organized crime. The evidence submitted to Switzerland was never disclosed to Reuben Sturman despite his discovery request. The District Court, after a *in camera* review of the evidence, ruled that the defendant had failed to show the government misrepresented the facts. Both David and Reuben Sturman assert that the records obtained as a result of the United States' action under the Treaty should not be admissible. They further argue that should this evidence be found inadmissible, the convictions based on the evidence should be reversed.

Article 37 of the Treaty provides that,

> [t]he existence of restrictions in this Treaty shall not give rise to a right on the part of any person to take any action in the United States to suppress or exclude any evidence or to obtain other judicial relief in connection with the requests under this Treaty . . . .

Treaty Between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 209, T.I.A.S. 8302.[8] This language indicates that neither David nor Reuben Sturman have standing to raise a claim under the Treaty. Relying on the decision of the D.C. Circuit Court in *Cardenas v. Smith*, 733 F.2d 909, 917-19 (D.C. Cir. 1984), defendants claim that the Treaty cannot deprive them of constitutional rights. *Id.* at 919.[9] Because we find the defendants have not been deprived of their constitutional rights, we do not consider whether they have standing to raise such claims.

A. Fourth Amendment

Reuben Sturman maintains that, because of Switzerland's strict banking secrecy laws, he has a reasonable expectation of privacy protected by the fourth amendment. In support of his assertion of an expectation of privacy, he relies on the Swiss penalties of imprisonment or fine for revealing information and on the

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[8]The Technical Analysis of Article 37 goes further adding,

> [e]nforcement of the provisions of the Treaty is a matter for the Contracting parties, and does not give rise to any right on the part of defendants . . . to obtain judicial relief . . . .

Technical Analysis of the Treaty Between the United States and Switzerland on Mutual Assistance in Criminal Matters, *reprinted in* Message from the President transmitting the Treaty with the Swiss Confederation on Mutual Assistance in Criminal Matters, 94th Cong., 2d Sess. 34 (1976).

[9]The *Cardenas* case involved an appeal by a nonresident alien seeking redress in United States Courts for the seizure of Swiss accounts in which plaintiff had an interest. The United States government had encouraged the Swiss government to seize the accounts. The plaintiff claimed that the seizure violated her rights under the fourth and fifth amendments as well as various statutory and Treaty related obligations. The D.C. Circuit recognized that Article 37 precluded any claims arising under the Treaty. The court found, however, that there was no evidence th t the Treaty intended to preclude judicial review of the statutory and constitutional claims. The court reversed the lower court's decision to dismiss the complaint so that the statutory and constitutional claims could be heard. 733 F.2d at 911-19.

Treaty's goal of preserving the integrity of Swiss banking law. In essence, the defendant argues a constitutional right created by the statutory rights granted him by a foreign country to records in that country. No such right of privacy in banking records is recognized in the United States. *United States v. Miller*, 425 U.S. 435 (1976).

Any privacy right conferred on Reuben Sturman by Switzerland and any remedy given for a violation of that right is limited by the terms of the Treaty. The Treaty clearly indicates that the Swiss government has agreed that an American citizen's right to privacy can be curtailed under certain circumstances. The Treaty also evidences a decision by the Swiss government to limit the remedy available once bank records are released. The Swiss government has limited the right to privacy given by its laws and denied to depositors any expectancy that, if records were disclosed to the United States, they could be suppressed or excluded from evidence. This intent is plainly stated in the language of Article 37 which is part of the law of Switzerland as well as the United States.

Even if Article 37 does not foreclose a fourth amendment claim for suppression of evidence, Reuben Sturman had no reasonable expectation of privacy in the documents for fourth amendment purposes. The Treaty makes any expectation of privacy limited through its terms. If no such expectation exists, then his ability to raise a fourth amendment claim is limited by the holdings of the United States Supreme Court. The Supreme Court has held that there is no privacy interest in the records and documents of third parties. *Rakas v. Illinois*, 439 U.S. 128 (1978); *Miller*, 425 U.S. at 435. Further, the fourth amendment does not justify exclusion of evidence when the defendant is not the victim of the challenged practices. The supervisory power of the federal courts does not allow it to suppress evidence that has been seized unlawfully from a person not before the court. *United States v. Payner*, 447 U.S. 727 (1980). Thus, since an individual has no privacy interest in his bank records, he cannot make a motion for exclusion once they are

obtained. Only the holder of the records, for example the bank, can raise an objection.

B. Due Process Claims

Reuben Sturman asserts that the submission of false statements linking him to organized crime in order to obtain information from a foreign country is the type of governmental misconduct which violates substantive due process. He also claims that he was denied any reasonable opportunity to respond to the charges in the documents submitted to the Swiss government and has thus been denied his procedural due process rights. These claims are without merit.

A review of the submissions to the Swiss government reveals that the documents contain no serious misrepresentations concerning the defendant. The District Court's review of the documents generated the same opinion. Even if misrepresentations were found, a reversal of conviction is not automatic. A federal court's supervisory power allows the court to remedy cases of serious governmental misconduct. *Payner*, 447 U.S. at 727; *United States v. Gjieli*, 717 F.2d 968 (6th Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984). Reversals of convictions using this power should not be granted readily. *Id.* at 978. This Court has held that the reversal of a conviction should be granted only when the following prerequisites are met:

> (1) there must be a constitutional injury which is personal to the complaining defendant, (2) the injury must "harm" the defendant in a legally significant way, (3) there must be an injury to the judicial system, (4) the "remedy" selected by the Court to preserve judicial integrity and deter future misconduct may not exceed established limitations on the court's power, and (5) the remedy selected must be narrowly tailored.

Id. at 978-79.

In *Gjieli*, the government improperly released defendant, Zeff Lulgjuraj, from prison. His release signalled his codefendants that a Bureau of Alcohol, Tobacco and Firearms agent was ready to deliver Lulgjuraj to them. The government officials submitted a false writ to a district judge in order to obtain the prisoner's release. One agent posed as a United States Marshal in order to secure custody of the prisoner. Applying the test above, this Court held that the government's misconduct did not entitle the defendants to reversal of their convictions. *Id.* at 979.

In this case, Reuben Sturman has suffered no identifiable constitutional injury. The defendant has no constitutional right to review submissions to the Swiss government made in the course of an investigation. Even if such a right existed, the defendant received adequate protection through the *in camera* review of the documents by the District Court and this Court. As discussed above, no right arises from any expectation of privacy asserted by the defendant. Reuben Sturman also urges that this Court find a deprivation of a liberty interest due to the stigmatization of his name. The documents submitted to the Swiss government have never been released or made public. This Court has held that "in order to establish a protectable liberty interest, the plaintiff must demonstrate . . . that the defendants publicly and voluntarily disclosed stigmatizing charges or information . . . ." *Yashon v. Gregory*, 737 F.2d 547, 556 (6th Cir. 1984).

Misconduct, if any, committed by the government in this case is not as serious as that committed in *Gjieli* where a reversal of conviction was denied. We find that the defendant has failed to satisfy the test articulated in *Gjieli*.

C. David Sturman

David Sturman obtained a decision from the Swiss Federal Supreme Court which held that no Swiss evidence could be used against him in a case for tax evasion.

Notice of Ruling by the Swiss Supreme Court That No Evidence Obtained from Switzerland May be Used Against David Sturman, October 13, 1989. Using this decision, David Sturman objected to the use of the evidence in the District Court. The District Court overruled his objection. We agree. The Swiss Central Authority advised the United States government that the Swiss documents could only be used against the codefendants if they were participants in Reuben Sturman's criminal activities. Article 5 para. 2(b) of the Treaty provides that evidence obtained under the Treaty can be used against persons accused of participating in the criminal activity and accessories. Evidence produced during this trial shows David Sturman's participation in Reuben Sturman's criminal activity. The admission of the Swiss evidence was thus permissible under the Treaty.

XIV. DENIAL OF REUBEN STURMAN'S DISCOVERY REQUEST

A Special Agent of the IRS, Richard N. Rosfelder, who was in charge of the investigation against the defendants, testified at trial about the investigation. Following his testimony, Reuben Sturman requested that the government produce several documents related to the testimony. Specifically, the defendant requested Rosfelder's Special Agent's Report outlining the investigation and suggesting indictment, the submissions to the Swiss government sent with the request for information under the Mutual Assistance Treaty, and the agent's grand jury testimony. The defendant claims that the government failed to produce 99% of the Special Agent's Report, the Swiss submissions, and 100 pages of grand jury testimony. The District Court held that the missing documents did not need to be produced and refused a request to conduct further voir dire of Special Agent Rosfelder to determine the contents of the documents.

A trial court's rulings on matters relating to the production of documents is reviewed under a clearly erroneous standard. *United States v. Nathan*, 816 F.2d

230 (6th Cir. 1987). The defendant raises two arguments in support of his contention that the denial of his discovery motion was reversible error.

First, the defendant claims that the denial of the discovery motion violates the provisions of the Jencks Act. 18 U.S.C. § 3500 (1985). The Jencks Act addresses demands for the production of statements and reports of witnesses. Particularly, the statute provides:

> After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.[10]

It is clear that the submissions to the Swiss government do not fall under the protections of the Act since they were prepared and signed by government attorneys, were not a verbatim transcript of any statements made by the agent, and were not reviewed for accuracy by the agent. The Special Agent's Report was reviewed by the District Court and certain sections which appeared to be statements of the witness were ordered released to the defendant. The remainder of the document is an internal prosecution report, prepared prior to the events discussed under direct examination, and thus exempt from discovery

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[10]The statute defines the term statement as

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500 (e).

under the Jencks Act. *United States v. O'Keefe*, 825 F.2d 314, 319 (11th Cir. 1987). The defendant also protests the denial of discovery with respect to the redacted portions of the grand jury testimony. The government claims that these portions did not need to be given to the defendant since they did not relate to the direct testimony of the witness and merely summarized documentary evidence and discussed subjects of investigation other than Reuben Sturman. A review of the redacted portions of the testimony reveals that this assessment is accurate.

Second, the defendant raises a protest to the nondisclosure of these documents based on *Brady v. Maryland*, 373 U.S. 83 (1963). The Supreme Court held in *Brady* that the suppression by the prosecution of evidence which is material to either guilt or punishment violates due process. This Court has held that,

> if the government does fail to disclose *Brady* material, the defendant has a constitutional remedy for the nondisclosure *only* if the defendant can show that there is a reasonable probability that "the omission deprived the defendant of a fair trial."

United States v. Presser, 844 F.2d 1275, 1282 (6th Cir. 1988) (citation omitted) (emphasis in original). The defendant has failed to show a reasonable probability that he was denied a fair trial. The evidence supporting the defendant's conviction was substantial. No arguments were made which suggest the information withheld contains facts which go directly to the guilt or innocence of the defendants. Both this Court and the District Court, in their *in camera* review, found that they do not. The District Court did not err in denying Reuben Sturman's discovery motion.

XV. THE BANK SECRECY ACT AND SELF-INCRIMINATION

Reuben Sturman was under investigation for tax-related violations from 1976 and was under grand jury

investigation from 1978. These investigations included the examination of the defendant's foreign bank accounts. Reuben Sturman's indictment listed several counts, associated with The Bank Secrecy Act, which alleged that the defendant had failed to file information related to the foreign accounts during the years he was being investigated. The defendant claims that the Bank Secrecy Act, which requires a person to file certain information if they have over a minimum amount of money in foreign accounts, is directed at persons suspect of criminal activities and promotes self-incrimination. The defendant asserts that the Act is therefore unconstitutional and that the trial court erred in denying his motion to dismiss and motion for judgment of acquittal on the counts related to the Act.

The Supreme Court has held that taxpayers cannot assert a violation of their rights against compulsory self-incrimination when they refuse to answer questions on a tax return for fear authorities will discover illegal activity. *United States v. Sullivan*, 274 U.S. 259, 260 (1927). *Sullivan* implies that any objections to specific questions will be considered only if the individual files a completed return and raises the objections in the return. A defendant's fear of self-incrimination cannot serve as a defense to a failure to complete the information called for on his tax return unless he raised an objection when he filed.

Even if *Sullivan* were not applicable to this situation, the defendant's claim is still without merit. The defendant bases his claim on a line of cases which have found various reporting requirements in violation of the privilege against compulsory self-incrimination when specific conditions are met. *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); *Haynes v. United States*, 390 U.S. 85 (1968).[11] The Supreme Court held in these cases that

[11]These cases dealt with an occupational tax related to wagers. Under the statute, persons registering as wagers had to keep on their persons stamps showing the payment of tax, maintain daily wagering

statutes violate the right against compulsory self-incrimination when (1) they are directed against a "selective group inherently suspect of criminal activity"; (2) requirements are imposed in an "area permeated with criminal statutes"; and (3) reporting requirements would have placed the subject in real danger of self-incrimination. *See Marchetti*, 390 U.S. at 47; *Grosso*, 390 U.S. at 64. The Bank Secrecy Act applies to all persons making foreign deposits, most of whom do so with legally obtained funds. The requirement is imposed in the banking regulatory field which is not infused with criminal statutes. In addition, the disclosures do not subject the defendant to a real danger of self-incrimination since the source of the funds is not disclosed. It is not evident from the information provided whether the money in the account came from a legitimate adult entertainment business or from a scheme to skim money from a business. Thus, the defendant has failed to show that the Bank Secrecy Act violated any individual right *Marchetti* and *Grosso* seek to protect.

XVI. DOUBLE JEOPARDY

Reuben Sturman received consecutive fines for Counts VII-XI, charging him with making and subscribing a false tax return in violation of 26 U.S.C. § 7206(1), and Counts II-VI, charging him with attempting to evade income taxes in violation of 26 U.S.C. § 7201. Relying on several cases from other circuit courts,[12] the defendant argues that filing a false tax return under section 7206(1) is a lesser included offense under attempted income tax

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records, and keep their books open for inspection. These persons were also liable for an occupational tax. The petitioners in these cases argued that the registration and tax requirements violated their rights against self-incrimination. Based on the criteria discussed above, the court found for the petitioners.

[12] *United States v. Citron*, 783 F.2d 307, 312 (2d Cir. 1986), *following remand*, 853 F.2d 1055 (2d Cir. 1988); *United States v. Pulawa*, 532 F.2d 1301, 1302 (9th Cir. 1976); *United States v. Slutsky*, 487 F.2d 832, 845 (2d Cir.), *cert. denied*, 416 U.S. 937 (1974).

evasion in violation of section 7201. In cases of lesser included offenses, consecutive sentences are double jeopardy since the offender cannot be tried and convicted under both statutes. At least one court, however, has recognized that the cases cited by the defendant address only cases where the proof of tax evasion necessarily proves the preparation and filing of a fraudulent return. *United States v. Franks*, 723 F.2d 1482, 1487 (10th Cir. 1983), *cert. denied*, 469 U.S. 817 (1984). The Tenth Circuit found that a misrepresentation of foreign bank account information is distinct from understating income on a tax return. Proving that a taxpayer violated section 7206(1) by misrepresenting her interest in or signature authority on a foreign account does not necessarily prove tax evasion. When the proofs on the charges are separate, the sentencing may be consecutive. *Id.* at 1487. We adopt the reasoning of the Tenth Circuit and allow the sentence to stand.

XVII. REFUSAL TO GIVE JURY INSTRUCTIONS

Reuben Sturman objects to the trial court's rejection of nine jury instructions requested by the defendant. Defendant seeks a reversal of his convictions due to the jury instruction errors. The defendant's objections are without merit.

The first requested jury instruction whose denial the defendant protests would have informed the jury that the activities of the defendants were not illegal unless the activities furthered a conspiracy to impede the IRS. A jury instruction read by the court instructed the jury that a conviction of the defendants on Count I was only possible if the government showed that the "means or methods described in the indictment were agreed upon to be used in an effort to . . . accomplish . . . the conspiracy." This instruction adequately covers the same ground as the requested instruction.

Defendant's requested jury instructions numbered 9, 10,

13, 14, and 15 set forth the defendant's argument that if the government had proved evasion of corporate, as opposed to individual income, then he was entitled to acquittal. The defendant asserts that the failure to present the requested instructions resulted in the jury only being presented with the prosecution's theory of the case. These instructions were addressed at Counts II - VI and Counts VII-XI. The defendant has waived his right to object to the court's refusal to give instructions 14 and 15 by failing to present distinct and clear objections with regard to those instructions.

The defendant's theory of the case as presented in requested instructions 9, 10, and 13 makes an incorrect statement of law. The requested instructions call on the jury to distinguish between income of the defendant and income accruing to the corporations. In this case, all the Swiss accounts were set up in the name of individuals. This Court, in *Davis v. United States*, 226 F.2d 331 (6th Cir. 1955), *cert. denied*, 350 U.S. 965 (1956), held that the unexplained transfer of funds to an individual's account constituted income to the individual. The government was not required to prove what use was made of the funds. The defense failed to prove that any of the funds were used to the benefit of any corporation.

The defendant next objects to the District Court's rejection of his suggested instructions 7 and 8 which addressed his reading of *Minarik*, 875 F.2d at 1186. This Court has found that the District Court properly allowed Count I and that *Minarik* did not apply in this case. Thus, no error resulted from the District Court's failure to give instructions 7 and 8.

The final objection raised in connection with jury instructions concerns defendant's requested instruction 17. This instruction, which sought to define when a false statement is knowingly made, was requested in relation to Counts VII-XI which charged the defendant with willfully filing fraudulent tax returns. The instruction stated that in order to establish a knowingly made false statement the

defendant must knowingly make a statement and know that the statement is false. The instruction was designed to present defense's assertion that failure to answer a question did not constitute a knowingly made false statement. It is a crime for any person to willfully make "any return, statement . . . which he does not believe to be true and correct as to every material matter." 26 U.S.C. § 7206(1). The District Court properly instructed the jury that the government had to prove that the defendant willfully made a false statement "as to a material matter alleged in the indictment." This instruction covered the issue presented by requested instruction 17. This Court finds no error on the part of the District Court with regard to jury instructions.

XVIII. ADMISSION INTO EVIDENCE OF FOREIGN BANK RECORDS

Volumes of business records from seven foreign banks were presented at trial. These records were "certified" by twelve affidavits or certificates of authenticity. This practice, adopted by Congress in 18 U.S.C. § 3505, dispenses with the necessity of calling a live witness to establish authenticity.

Section 3505 allows the admission of foreign records, and prevents their exclusion as hearsay, provided that a foreign certification attests to certain facts.[13] A foreign

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[13] 18 U.S.C. § 3505 reads in relevant part:

(a)(1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that --

(A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

(B) such record was kept in the course of regularly conducted business activity;

(C) the business activity made such a record as a regular practice; and

certification serves to authenticate the records. Reuben Sturman asserts that there was error in the admission and maintenance of records the prosecution received from Switzerland. He also objects to the admission of the foreign bank records urging that section 3505 is unconstitutional because it deprives him of his right to confrontation.

The certificates at issue indicated that the person signing the certificates was acting in the capacity of custodian of the records, that the records were made or received in the regular course of business, and that the records were part of a regular business practice that made or received the documents at the time, or within a reasonable time thereafter, of the recorded event. These attestations satisfy most of the provisions of section 3505. The certificate fails to state that the "record was made . . . by (or from information transmitted by) a person with knowledge of those matters." 18 U.S.C. § 3505(a)(1)(A). Reuben Sturman contends that this foundational element must be established. This Court, when interpreting similar language in Federal Rules of Evidence 803(6),[14] has held that a witness need only have knowledge of the recordkeeping procedures. *United States v. Hathaway*, 798 F.2d 902 (6th Cir. 1986). In this case, a bank official, who would necessarily have some knowledge of the bank's recordkeeping procedures, provided the certification.

The defendant also protests that the certificates were not

(D) if such record is not the original, such record is a duplicate of the original;

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

. . . .

[14]Fed. R. Evid. 803(6) list evidence which may not be excluded by the hearsay rule. Section 6 addresses records of regularly conducted activity. Such records must be "made at or near the time by, or from information transmitted by, a person with knowledge . . . ."

physically attached to the records being authenticated and that the certifications did not identify the specific records they authenticate. Neither of these assertions is valid. Section 3505 contains no requirement that the certificate be attached to the authenticated record. Each certificate was associated with a transmittal record that listed the account and record of accounts being produced. The certifications incorporated these transmittal letters.

The defendant also raises the following arguments: (1) that the "legal advisor" who signed the certification was not a "custodian" under the requirement of section 3505; (2) that section 3505 does not refer to records "received" which the certification includes in its description of the records; and (3) that the certification states that it was the regular course of business to make "documents of this kind" rather than the specific record being authenticated. After a careful consideration of these issues, this Court find the claims to be without merit.

Reuben Sturman also alleges that section 3505 deprives him of his sixth amendment right of confrontation. We disagree. The confrontation clause does not establish an absolute exclusion of all hearsay. Testimony of an unavailable witness is permissible provided it contains an "indicia of reliability." *United States v. Miller*, 830 F.2d 1073 (9th Cir. 1987), *cert. denied*, 485 U.S. 1033 (1988) (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)). The Supreme Court in *Bourjaily v. United States*, 483 U.S. 171, 182-83 (1987), has held that "[b]ecause 'hearsay rules and the Confrontation Clause are generally designed to protect similar values,' . . . no independent inquiry into reliability is required when the evidence 'falls within a firmly rooted hearsay exception.'" (quoting *Roberts*, 448 U.S. at 66) (citations omitted). Section 3505 establishes an exception to the hearsay rule for foreign business documents. This exception ensures that the requirements of the Confrontation Clause are automatically satisfied.

Finally, the defendant claims that the prosecution failed to satisfy the foundational requirements of Federal Rules

of Evidence 602 and 901. Rule 602 requires the introduction of evidence which supports a finding that a witness has personal knowledge of the matter on which they are to testify. Rule 901 requires authentication and identification prior to the admissibility of any evidence. The admissibility of foreign records is a question that may be determined by the court before trial. Fed. R. Evid. 104(a); Fed. R. Evid. 3505(b); *United States v. Tedder*, 801 F.2d 1437, 1448 (4th Cir. 1986), *cert. denied*, 480 U.S. 938 (1987). The District Court held a pre-trial hearing on November 6 and 16, 1987 to determine the admissibility of the challenged records. There was no necessity of repeating this hearing before the jury. In addition, the prosecution did have Special Agent Rosfelder testify regarding the receipt, custody, and certification of the records. The defense was given an opportunity at that time to cross-examine the witness.

Special Agent Rosfelder admitted during his testimony that he did not have custody of the records at all times and therefore lacked personal knowledge regarding some of the details of the receipt and maintenance of the records. Even if the court did commit error by allowing Rosfelder to testify on an issue of which he did not have personal knowledge, the error is harmless. Special Agent Rosfelder's testimony was sought as the result of challenges to the certification of the records. Since we find the certificates to be adequate, the testimony was unnecessary.

CONCLUSION

Accordingly, the decision of the District Court is AFFIRMED as to all defendants.

United States District Court

Northern DISTRICT OF Ohio, Eastern Division

UNITED STATES OF AMERICA

V.

RALPH LEVINE

JUDGMENT IN A CRIMINAL CASE

Case Number: CR85-133

(Name and Address of Defendant)

Alan Andrews
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

[☐ guilty ☐ nolo contendere] as to count(s) _____, and
☒ not guilty as to count(s) 1.

THERE WAS A:

[☐ finding ☒ verdict] of guilty as to count(s) 1.

THERE WAS A:

[☐ finding ☐ verdict] of not guilty as to count(s) _____.
☐ judgment of acquittal as to count(s) _____.
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

Conspiracy of Defraud the U.S. Department of Treasury, Internal Revenue Service, in violation of Title 18 U.S.C. 371

IT IS THE JUDGMENT OF THIS COURT THAT: Defendant is hereby committed to the custody of the Attorney General for a period of three (3) years. It is further ordered that the defendant is fined $10,000, which shall be paid within 30 days of the date of sentencing. It is further ordered that the defendant shall remain on the same bond pending timely appeal.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;
(2) associate only with law-abiding persons and maintain reasonable hours;
(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);
(4) not leave the judicial district without permission of the probation officer;
(5) notify your probation officer immediately of any changes in your place of residence;
(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $ _____ pursuant to Title 18, U.S.C. Section 3013 for count(s) _____ as follows:

IT IS FURTHER ORDERED THAT counts _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

☐ The Court orders commitment to the custody of the Attorney General and recommends:

February 12, 1990

Date of Imposition of Sentence

s/ George W. White

Signature of Judicial Officer

George W. White, U.S. District Judge

Name and Title of Judicial Officer

February 15, 1990

Date

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at
Date

_____, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By _____
Deputy Marshal

United States District Court
NORTHERN DISTRICT OF OHIO, EASTERN DIV

UNITED STATES OF AMERICA

V.

MELVIN I. KAMINSKY
29076 Cedar Road
Pepper Pike, Ohio 44124

JUDGMENT IN A CRIMINAL CASE
Case Number: CR 85-133

(Name and Address of Defendant)

Paul J. Cambria
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

[☒ guilty ☐ nolo contendere] as to count(s) one, and
☐ not guilty as to count(s) _____.

THERE WAS A:

[☐ finding ☐ verdict] of guilty as to count(s) _____.

THERE WAS A:

[☐ finding ☐ verdict] of not guilty as to count(s) _____.
☐ judgment of acquittal as to count(s) _____
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

Conspiracy to defraud the United States Department of Treasury, Internal Revenue Service, 18:371

IT IS THE JUDGMENT OF THIS COURT THAT:
The defendant shall be sentenced to the custody of the Attorney General for a period of one year; to serve in a pre-release pro-

gram at the Harbor Light Half-way Facility, Cleveland, Ohio with immediate work release, release after work until curfew, and release on weekend pass upon verification of his employment. Defendant shall pay the per diem cost of his stay at the facility. He shall then be placed on probation for a period of two years on condition he shall perform two years community service in a program approved by the Probation Office at a rate of 20 hours per month and pay a fine of $50,000.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;
(2) associate only with law-abiding persons and maintain reasonable hours;
(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);
(4) not leave the judicial district without permission of the probation officer;
(5) notify your probation officer immediately of any changes in your place of residence;
(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years

permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $ 50.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) _____ as follows:

IT IS FURTHER ORDERED THAT counts _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

☒ The Court orders commitment to the custody of the Attorney General and recommends:
The defendant will voluntarily surrender to the U.S. Marshal in one week. (August 27, 1990)

August 20, 1990

Date of Imposition of Sentence

s/ George W. White

Signature of Judicial Officer

George W. White, U.S. District Judge

Name and Title of Judicial Officer

August 21, 1990

Date

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at
Date

_____, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By _____
Deputy Marshal

Nos. 90-3147/48/51/3750

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
JAN 08 1992
LEONARD GREEN, Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID A. STURMAN, ET AL.,
Defendants-Appellants.

ORDER

BEFORE: KENNEDY and MILBURN, Circuit Judges; and WILHOIT,* United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green

Leonard Green, Clerk

*Hon. Henry R. Wilhoit, Jr. sitting by designation from the Eastern District of Kentucky

CONSTITUTION OF THE UNITED STATES

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

TITLE 18, UNITED STATES CODE

§371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§3505. Foreign records of regularly conducted activity.

(a) (1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that —

(A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

(B) such record was kept in the course of a regularly conducted business activity;

(C) the business activity made such a record as a regular practice; and

(D) if such record is not the original, such record is a duplicate of the original;

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

(2) A foreign certification under this section shall authenticate such record or duplicate.

(b) At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

(c) As used in this section, the term —

(1) "foreign record of regularly conducted activity" means a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country;

(2) "foreign certification" means a written declaration made and signed in a foreign country by the custodian of a foreign record of regularly conducted activity or another qualified person that, if falsely made, would subject the maker to criminal penalty under the laws of that country; and

(3) "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

TITLE 26, UNITED STATES CODE

§7201. Attempt to evade or defeat tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

§7206. Fraud and false statements.

Any person who —

(1) **Declaration under penalties of perjury.** — Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) **Aid or assistance.** — Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not auch falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) **Fraudulent bonds, permits, and entries.** — Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or pro-

cures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) **Removal or concealment with intent to defraud.** — Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) **Compromises and closing agreements.** — In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully —

(A) **Concealment of property.** — Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) **Withholding, falsifying, and destroying records.** — Receives, withholds, destroys, mutilates, or falsifies any a book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 15. Depositions.

(a) **When Taken.** Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is detained pursuant to section 3144 of title 18, United States Code, the court on written motion of the witness and upon notice to the parties may direct that the witness' deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(b) **Notice of Taking.** The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at the examination and keep the defendant in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause the defendant's removal from the place of the taking of the deposition, the defendant persists in conduct which is such as to justify exclusion from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but a failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule

shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(c) **Payment of Expenses.** Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and the defendant's attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the government.

(d) **How Taken.** Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without that defendant's consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or the defendant's counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.

(e) **Use.** At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with that witness' deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of it which is relevant to the part offered and any party may offer other parts.

(f) **Objections to Deposition Testimony.** Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.

(g) **Deposition by Agreement Not Precluded.** Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 28. Persons Before Whom Depositions May Be Taken.

(a) **Within the United States.** Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. The term officer as used in Rules 30, 31 and 32 includes a person appointed by the court or designated by the parties under Rule 29.

(b) **In Foreign Countries.** In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(c) **Disqualification for Interest.** No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

Rule 30. Depositions Upon Oral Examination.

(a) **When Depositions May be Taken.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) **Notice of Examination; General Requirements; Special Notice; Non-Stenographic Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.**

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by the plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless the person's deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and the attorney's signature constitutes a certification by the attorney that to the best of the attorney's knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when the party was served with notice under this subdivision (b)(2) the party was unable through the exercise of diligence to obtain counsel to represent the party at the taking of the deposition, the deposition may not be used against the party.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at the party's own expense. Any objections under subdivision (c), any changes made by the witness, the witness' signature identifying the deposition as the witness' own or the statement of the officer that is required if the witness do not sign, as provided in subdivision (e),

and the certification of the officer required by subdivision (f) shall be set forth in a writing to accompany a deposition recorded by non-stenographic means.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For the purposes of this rule and Rules 28(a), 37(a)(1), 37(b)(1) and 45(d), a deposition taken by telephone is taken in the district and the place where the deponent is to answer questions propounded to the deponent.

(c) **Examination and Cross-Examination; Record of Examination; Oath; Objections.** Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the office's di-

rection and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subdivision (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) **Motion to Terminate or Limit Examination.** At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) **Submission to Witness; Changes; Signing.** When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless such examination and reading are waived by the witness

and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) **Certification and Filing by Officer; Exhibits; Copies; Notice of Filing.**

(1) The officer shall certify on the deposition that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. Unless otherwise ordered by the court, the officer shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to the deposition, and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the

originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the material may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) **Failure to Attend or to Serve Subpoena; Expenses.**

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because that party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

FEDERAL RULES OF EVIDENCE

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Rule 804. Hearsay Exceptions: Declarant Unavailable.

(a) **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant —

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) **Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) **Statement under belief of impending death.** In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) **Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) **Statement of personal or family history.** (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by the admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it

makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA
Plaintiff,

vs.

REUBEN STURMAN, et al
Defendants.

CASE NO. CR85-133

HON. GEORGE W. WHITE

ORDER

This matter is before the Court upon the motions of Reuben Sturman and Mevin Kamins in opposition to the introduction of records pursuant to the provisions of 18 U.S.C. §3505. The Court finds defendants' arguments as to the constitutionality of this statute to be without merit. A hearing as to the trustworthiness of certificates accompanying the foreign records will be held November 6, 1987 at 9:30 A.M. This hearing will also include rulings on the issues of appointment of an interpreter and the governments' motion to take depositions in Switzerland. All attorneys shall be present with their clients.

Accordingly, defendants Reuben Sturman and Melvin Kamins' motion concerning the constitutionality of 18 U.S.C. §3505 is denied.

IT IS SO ORDERED.

s/ George W. White

George W. White
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA — CASE NO. CR85-133

Plaintiff — HON. GEORGE W. WHITE

vs.

REUBEN STURMAN, et al

Defendants

MEMORANDUM AND ORDER

On October 30, 1987 this Court denied the motions of defendants Sturman and Kamins concerning the constitutionality of 18 U.S.C. §3505. A hearing on the trustworthiness of the documents received from Switzerland was held on November 6, 1987 and concluded on November 16, 1987. The Court has examined the documents and relying on *United States v. Miller,* 830 F.2d 1073 (9th Cir 1987), finds them to be trustworthy.

The Court in *Miller* was faced with the same issue involved in this court; i.e., whether §3505 violates the Confrontation Clause of the Sixth Amendment. The documents in *Miller* consisted of Swiss bank records accompanied by statements made under criminal penalty for falsity by bank employees. The Court found that although having an attestation before a judge or public prosecutor is preferred to the practice of swearing before a notary and that a high bank officer is preferred to a simple employee, each bears indicia of reliability. The admission of business records is a common exception to the hearsay rule. *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d. 597 (1980). "Firmly-rooted exceptions to the hearsay rule do not offend the Confrontation Clause. *Bourjailly v. United States*, ____U.S.____, 107 S.Ct. 2775, 2783, 97 L.Ed.2d 144 (1987). The Court in *Miller* further stated that banks depend on keeping accurate records and their records are the most common type of business records used in Court. As in *Miller,* Sturman and Kamins have not suggested a motive for bank officials to falsify the records. The recor-

dkeepers in *Miller* asserted under criminal penalties in their own country that the records were kept in the course of business. If *Miller* felt the records were inaccurate he could depose the recordkeepers and challenge the records.

The Court has examined the documents contained in the Appendix to defendant Reuben Sturman's motion in opposition to the introduction of records pursuant to the provisions of 18 U.S.C. §3505. These included documents from the Algemene Bank of Nederland N.V., Swiss Bank Corporation, Union Bank of Switzerland, Credit Suisse, Zurich, Libra Bank, Ltd, London, First Interstate Bank of California in London and Barclays Bank Ltd., Jersey, Channel Islands. The documents from the Swiss bank include a certificate of Authority Executing United States Request for Documents from a District Attorney with a Certificate Authenticity from the bank employee stating that the records were received and kept in the ordinary course of business and made at the time of the act or transactions recorded in them or within a reasonable time afterwards. The London bank records include statements from the bank officials and statements on oaths that their statements are true. The statements each declare the necessary declaration required for admittance of business records. The Algemene Bank of Nederland submitted a certificate of Authenticity of Business Records from the Bank Manager who made the necessary statements under oath. The records from Barclays Bank were submitted through Barrie Ian Davis, representing Barclays Bank, through a letter rogatory. Davis was asked questions presented by the United States by an Assistant Magistrate. The Assistant Magistrate asked Davis the necessary questions for admittance of business records and Davis gave satisfactory answers. If the defendants believe the records to be inaccurate, they may challenge them by deposing recordkeepers. *See U.S. v. Miller*, 830 F.2d at 1078.

Accordingly, the Court finds the documents to be properly authenticated to be admissible as business records.

IT IS SO ORDERED.

s/ George W. White

George W. White
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff, CASE NO. CR 85-133

v.

JUDGE GEORGE W. WHITE

REUBEN STURMAN, *ET AL.*,
Defendants.

ORDER

On April 11, 1989, the Swiss Supreme Court denied all oppositions filed concerning the Swiss depositions previously ordered by this Court. In view of the need for these depositions, the trial scheduled for June 5, 1989 is continued until September 5, 1989; the Swiss depositions are scheduled before Magistrate Holdener in Zurich, Switzerland for the week of June 5-9, 1989.

With respect to the Swiss depositions:

1. All parties wishing to examine and/or cross-examine Messrs. Schlaeppi; Meier, Bruner, Perrelet, and Schmid shall be present at the proceedings conducted by Magistrate Holdener in Zurich on June 5-9, 1989;

2. All parties wishing to conduct direct examination (as opposed to cross-examination) of the witnesses shall submit written questionnaires to Magistrate Holdener by May 22, 1989;

3. Each defendant shall provide to the government the names of all persons attending the depositions on his or her behalf by May 12, 1989 so as to enable the government to obtain the necessary travel authorizations and to enable the Swiss magistrate to reserve an appropriate facility;

4. Subject to the liminations set forth in paragraph 5, below, the government shall pay the travel and subsistence expenses in-

curred by the defendants and one attorney for each defendant and by a law clerk, court reporter, and interpreter designated by the Court;

5. All individuals attending the depositions at government expense are traveling on official government business and are subject to the terms and limitations set forth in the Federal Travel Regulations (FPMR 101-7), including, but not limited to, the requirements that individuals must fly on a United States flag carrier (Title 46, U.S.C. §1517; FPMR 101-7, chapter 1-3.6), must fly at less than first-class rates (FPMR 101-7, chapter 1-3.3d(1)), and must fly on the government's contract carrier service (FPMR 101-7, Chapter 1.2.1c(a)(i)). Individuals wishing to have the government pay their air transportation expenses in advance must submit to the government, by May 10, 1989, their dates of departure and return to enable the government to make the necessary arrangements. The government will then make the air reservations and purchase the airline tickets. Once the tickets are purchased, individuals may, at their own expense, upgrade the tickets for higher fare tickets with the contract carrier. Individuals wishing to purchase their own tickets may do so, but will receive reimbursement after returning from Switzerland only to the extent they comply with the requirements of FPMR 101-7. Meal and lodging expenses will be reimbursed by the government after return from Switzerland at the maximum per diem rate applicable to official government travel to Zurich, Switzerland during the week of June 5-9, 1989. The government shall notify the parties of the applicable per diem rate for the week of June 5-9, 1989, as soon as the United States Department of State sets the rates for that week.

IT IS SO ORDERED.

HONORABLE GEORGE W. WHITE
United States District Court Judge

May 4, 1989

(2) (2) (2)

Supreme Court, U.S.
FILED
MAY 26 1992
CLERK

Nos. 91-1367, 91-1533 and 91-1596

In the Supreme Court of the United States

OCTOBER TERM, 1991

DAVID A. STURMAN, PETITIONER

v.

UNITED STATES OF AMERICA

RALPH LEVINE AND MELVIN KAMINSKY,
PETITIONERS

v.

UNITED STATES OF AMERICA

REUBEN STURMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

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QUESTIONS PRESENTED

1. Whether petitioners were properly convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, by impeding the lawful functions of the Internal Revenue Service (Nos. 91-1533 and 91-1596 only).

2. Whether testimony of foreign witnesses from court-ordered depositions conducted in Switzerland with the participation of all interested parties and counsel was properly admitted at petitioners' criminal trial.

3. Whether 18 U.S.C. 3505, which governs the admissibility of foreign business records, violates the Confrontation Clause (Nos. 91-1533 and 91-1596 only).

4. Whether petitioner Reuben Sturman was entitled to challenge factual assertions made by the United States to the Swiss government in obtaining Swiss bank records pursuant to a mutual assistance treaty (No. 91-1596 only).

5. Whether the trial judge was required to recuse himself (No. 91-1596 only).

6. Whether separate fines could be imposed on petitioner Reuben Sturman for filing a false income tax return (26 U.S.C. 7206(1)) and attempted tax evasion (26 U.S.C. 7201) (No. 91-1596 only).

7. Whether the reporting requirements of the Bank Secrecy Act violate the Fifth Amendment privilege against compelled self-incrimination (No. 91-1596 only).

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1367

DAVID A. STURMAN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 91-1533

RALPH LEVINE AND MELVIN KAMINSKY,
PETITIONERS

v.

UNITED STATES OF AMERICA

No. 91-1596

REUBEN STURMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) [1] is reported at 951 F.2d 1466.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1991. Petitions for rehearing were denied on January 8, 1992. The petition for a writ of certiorari in No. 91-1367 was filed on February 26, 1992; the petition in No. 91-1533 was filed on March 24, 1992; and the petition in No. 91-1596 was filed on April 3, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Ohio, petitioners were convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, by impeding the lawful functions of the Internal Revenue Service.[2] Petitioner Reuben Sturman was convicted of several additional offenses: five counts of attempted income tax evasion (26 U.S.C. 7201); five counts of making and subscribing a false income tax return (26 U.S.C. 7206(1)); four counts of willfully failing to maintain records and file reports of transactions and relationships with a foreign financial institution (31 U.S.C. 1059, as recodified at 31 U.S.C. 5322, effective September 13, 1982); and one count of obstructing justice (18 U.S.C. 1503). The district court sen-

[1] Unless otherwise noted, references are to the petition appendix in No. 91-1367.

[2] Petitioner Kaminsky entered a conditional guilty plea and joined in the appeal in this case.

tenced petitioner David Sturman to a four-year prison term; in addition, he was fined $10,000 and ordered to pay $73,651.55 in costs of prosecution equally with petitioner Reuben Sturman. Petitioner Ralph Levine was sentenced to a three-year prison term and a $10,000 fine. Petitioner Melvin Kaminsky was sentenced to a one-year prison term, to be followed by two years' probation and a $50,000 fine. Petitioner Reuben Sturman was sentenced to a total of ten years' imprisonment, was fined $2,460,000, and was ordered to pay $73,651.55 in costs of the prosecution equally with petitioner David Sturman. The court of appeals affirmed. Pet. App. 1a-42a.

1. The evidence at trial showed that, from 1968 through 1987, petitioners conspired among themselves and with others to obstruct the lawful functions of the IRS in the assessment and collection of taxes owed by Reuben Sturman. Reuben Sturman engaged in the production, distribution, and sale of sexually explicit books and other materials. David Sturman was responsible for his father Reuben's businesses in the San Francisco area. Levine ran the Nevada businesses, while Kaminsky ran Reuben Sturman's principal business, Sovereign News Company. Pet. App. 2a-3a.

Reuben Sturman skimmed cash profits from his adult bookstores, peep shows, and other businesses. He concealed his ownership of those businesses by establishing more than 150 domestic corporations and five foreign corporations in countries with strict secrecy policies. The domestic companies were owned by nominees and run by fictitious officers. Reuben Sturman also opened several Swiss bank accounts with the stated goal of "conceal[ing] his money" and "avoid[ing] taxes." Money was transferred to

the Swiss accounts through a series of transfers involving the domestic and foreign companies. Pet. App. 2a-3a; Gov't C.A. Br. 3-35.

Reuben Sturman did not report all of his income and corporate transactions to the IRS; indeed, he reported less than 11 percent of his income between 1978 and 1982. His unreported income for those years was $2,735,713, creating a tax liability of $1,442,945. Moreover, he improperly failed to disclose on tax forms his various foreign accounts. Pet. App. 3a; Gov't C.A. Br. 31-35.

2. David Sturman, Levine, and Kaminsky, in addition to running various of Reuben Sturman's businesses, helped conceal Reuben's overall assets and income in several ways. For example, David Sturman was the director and nominee shareholder of Societe Financiere, a Liberian shell company used by Reuben Sturman to receive and funnel proceeds from his adult entertainment businesses. David Sturman also had signature authority over Societe Financiere's Swiss bank account, as well as more than 20 other Swiss accounts that were used to conceal assets and income. David and Reuben Sturman signed the names of fictitious persons to most of the accounts. For example, in 1974, Reuben Sturman used a false Dutch passport to open two Swiss accounts under the alias of Paul Bekker. When Reuben Sturman was later arrested by Swiss authorities for falsifying identification papers, the authorities seized a document signed by Sturman in which "Paul Bekker" granted power of attorney for those two accounts to David Sturman. Reuben Sturman admitted to Swiss authorities that he used the account to receive proceeds funneled from his American businesses. Pet. App. 2a, 9a; Gov't C.A. Br. 12-13, 15, 57-58.

Similarly, Levine aided Reuben Sturman in concealing assets from the IRS. Jack Marcum, who was employed by Levine and Reuben Sturman, testified that at least $70,000 per month from the Nevada businesses went unrecorded. Levine also had signature authority (under various aliases) over several Swiss bank accounts, which were never reported to the IRS. Finally, Kaminsky, the manager of Reuben Sturman's principal business, provided substantial assistance to Reuben Sturman's efforts to conceal his financial interests from the IRS. Pet. App. 9a-10a; Govt's C.A. Br. 5-6.

3. In 1985, the district court issued a pretrial order authorizing overseas depositions of Swiss bank officials pursuant to Fed. R. Crim. P. 15. Pet. App. 43a. Those depositions, and the trial itself, were delayed several years as petitioners raised various objections both in this country and in Switzerland. See *id.* at 44a. In an order dated May 4, 1989, the district court noted that "[o]n April 11, 1989, the Swiss Supreme Court denied all oppositions filed concerning the Swiss depositions previously ordered by this Court." *Id.* at 48a. The order noted that the depositions would be held before Swiss Magistrate Benedikt Holdener in Zurich during the week of June 5-9, 1989. *Ibid.* The court ordered that "direct examination (as opposed to cross-examination)" questions for the five Swiss witnesses be submitted in writing to Magistrate Holdener no later than May 22, 1989. *Id.* at 48a-49a. The government was ordered to pay the travel expenses for petitioners and their attorneys. *Id.* at 45a, 49a.

Petitioners were represented at the depositions by eight American attorneys and six Swiss attorneys.[3]

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[3] Although petitioners all had the right to be present, Reuben Sturman was the only petitioner who personally attended the depositions.

At the outset of each deposition, Magistrate Holdener warned the witness of the penalties under Swiss law for giving false testimony. Holdener then posed to each witness the questions submitted by the government. The proceedings were conducted in the German language, but English translations were provided by an official Swiss interpreter. In addition, the six bilingual Swiss attorneys provided the defense team with a virtually verbatim translation of the German questions and answers. After direct examination, defense counsel submitted oral questions to Holdener, who again posed them to the witness. All questions posed by defense counsel, except one relating to the compensation of one witness, were asked of the witness. Although an American court reporter was present, Holdener contemporaneously dictated the official, substantially verbatim summary version of the testimony. At the conclusion of each deposition, the witness read Holdener's summary, was permitted to correct any inaccuracies, and then signed it. Pet. App. 21a; Gov't C.A. Br. 91-92.

4. The trial of this case lasted three months. The written summaries of the Swiss depositions that were read into the record at trial in question and answer form occupied fewer than 60 of the 5000 pages of transcript. See C.A. Jt. App. 2003-2059. The depositions concerned some of the Swiss bank accounts that petitioners had opened under various names. *Ibid.*

The district court admitted the depositions after reviewing them and considering defense objections. The court found that "the defendants were entitled to be present there, they were entitled to have counsel there, counsel for the government was entitled to have questions read, and it appears to me that counsel for the defendants were entitled to submit questions to

the magistrate for answers by the witnesses." Pet. App. 21a.

5. The court of appeals affirmed petitioners' convictions. Pet. App. 1a-42a. The court first held that petitioners properly were convicted of conspiring to defraud the United States, in violation of 18 U.S.C. 371. Pet. App. 3a-7a. The court distinguished its prior decision in *United States* v. *Minarik*, 875 F.2d 1186 (6th Cir. 1989). Pet. App. 5a-7a. In addition, the court rejected challenges by petitioners David Sturman and Levine to the factual sufficiency of the evidence and to the factual support for the existence of a single conspiracy. *Id.* at 8a-12a.

The court of appeals next held that the Swiss depositions had properly been admitted. Pet. App. 20a-24a. The court held that there had been substantial compliance with Fed. R. Crim. P. 15 and that petitioners' constitutional rights had been protected. Pet. App. 22a-23a. The court explained that "[d]epositions taken in foreign countries cannot at all times completely emulate the United States' method of obtaining testimony" but that "[h]ere, all steps were taken to ensure [petitioners'] rights while respecting the legal rules established in a different country." *Id.* at 22a. Addressing petitioners' specific challenges to the Swiss procedures, the court noted that "[a]ll defense questions, with just one exception, were submitted to the witnesses so that objections and determinations on admissibility could be litigated later." *Ibid.* (footnote omitted). The court also noted that, "[a]lthough the witnesses were not given an oath, [the] defense conceded that each witness was told the penalties for giving false testimony." *Ibid.* The court found that petitioners "failed to point to any way in which they were prejudiced by the procedures used." *Id.* at 23.

The court also rejected claims that Swiss Magistrate Holdener should not have been allowed to preside over the depositions because he was not impartial. Pet. App. 23a. The court noted that, although Swiss law "permits a person to serve as both magistrate and prosecuting attorney," petitioners "failed to establish evidence that Magistrate Holdener's handling of the deposition unfairly prejudiced [petitioners] or that the testimony could be considered unreliable." *Ibid.* Finally, the court rejected challenges to the manner in which one Swiss deponent had identified Reuben Sturman as a former customer. *Id.* at 23a-24a.

The court further held that "[v]olumes of business records from seven foreign banks" had properly been admitted at trial pursuant to 18 U.S.C. 3505. Pet. App. 39a-42a. The court explained that the statutory prerequisites to admission of foreign business records had been satisfied, and that the statute did not violate the Confrontation Clause. *Ibid.*

Finally, in addition to other claims not renewed by petitioners in this Court, the court of appeals rejected several claims that only petitioner Reuben Sturman renews. The court held that Reuben Sturman was not entitled to challenge factual assertions made by the United States in obtaining Swiss bank records pursuant to a mutual assistance treaty (Pet. App. 26a-31a); that the district court was not required to recuse itself (*id.* at 24a-26a); that the district court permissibly imposed consecutive fines for filing a false income tax return and for attempted tax evasion (*id.* at 36a-37a); and that the reporting requirements of the Bank Secrecy Act do not violate the Fifth Amendment privilege against compelled self-incrimination (*id.* at 34a-36a).

ARGUMENT

1. Petitioners Levine and Kaminsky (91-1533 Pet. 4-12) and petitioner Reuben Sturman (91-1596 Pet. 29-30) seek further review of their claim that they were improperly convicted of conspiring to defraud the United States, in violation of 18 U.S.C. 371. There was overwhelming evidence that petitioners conspired to conceal Reuben Sturman's assets from the Internal Revenue Service. Petitioners claim, however, that such a conspiracy should not be actionable under 18 U.S.C. 371 as a conspiracy to defraud the United States. That claim is meritless.

The federal conspiracy statute, 18 U.S.C. 371, prohibits conspiracies "either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose." This Court has broadly interpreted the "defraud" clause of the conspiracy statute, holding that it "reaches any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government." *Tanner* v. *United States*, 483 U.S. 107, 128 (1987) (quotation omitted). Accordingly, the Court has rejected any suggestion that the "offense" and "defraud" clauses are mutually exclusive, such that a prosecution under the latter clause turns on whether defendants conspired to commit a specific substantive offense. For example, in *Dennis* v. *United States*, 384 U.S. 855 (1966), the defendants were convicted of conspiring to defraud the United States by filing false affidavits with the National Labor Relations Board. They argued that the case involved "a conspiracy to commit the substantive offense of filing false statements in violation of 18 U.S.C. 1001" and that their misconduct "may not properly be laid under

the conspiracy-to-defraud clause of § 371." 384 U.S. at 862-863. This Court held that "[t]he fact that the events [charged] include the filing of false statements does not, in and of itself, make the conspiracy-to-defraud clause of § 371 unavailable to the prosecution." *Id.* at 863-864.

Petitioners claim (91-1533 Pet. 5-12) that the Sixth Circuit's decision in this case conflicts with its prior decision in *United States* v. *Minarik*, 875 F.2d 1186 (1989). Even if petitioners were correct, further review by this Court would not be warranted to resolve an intra-circuit conflict. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

In any event, the court of appeals in this case carefully distinguished its prior holding in *Minarik*. See Pet. App. 4a-7a. *Minarik* held that the offense and defraud clauses of the conspiracy statute were mutually exclusive "as applied to the facts of [that] case." 875 F.2d at 1187. The facts in *Minarik*, which involved the concealment of assets after a taxpayer had received assessment notices, fell squarely within the prohibition contained in 26 U.S.C. 7206(4) relating to post-assessment concealment. See 875 F.2d at 1187, 1194-1195. Although the government could have brought a straightforward charge of conspiracy to violate 26 U.S.C. 7206(4), it instead proceeded under the defraud clause while changing its theory of the case several times without further specifying the charge. See 875 F.2d at 1187, 1190. Notwithstanding broader dicta in the opinion, the *Minarik* court's actual holding was very narrow: "[W]here the duties of a citizen are as technical and difficult to discern as they are when a taxpayer, before levy, engages in otherwise legitimate activities that may make ultimate collection more difficult, we hold that

a Congressional statute closely defining those duties takes a conspiracy to avoid them out of the defraud clause and places it in the offense clause." *Id.* at 1196. The court took pains "to emphasize the limits of our holding." *Id.* at 1195-1196.

We believe that *Minarik* was wrongly decided even on its own facts. The decision finds no support in the language of the statute; it conflicts with *Dennis* and *Tanner*; and its interpretation of the conspiracy statute is unworkable in practice. But even assuming that *Minarik* was correctly decided, the court of appeals correctly declined to extend it to the very different factual setting of this case. Unlike *Minarik*, the conspiracy here was far broader than the violation of a single substantive statute. As the court of appeals explained (Pet. App. 7a), "[o]nly the defraud clause can adequately cover all the nuances of a conspiracy of the magnitude this case addresses." As the court of appeals also explained (*ibid.*), the "chief concern" in *Minarik* "was that the government, by constantly changing the prosecution theory, never adequately informed the defendant of the charges against him." Here, in contrast, "[t]he prosecution has presented the case clearly and no confusion as to the charges is evident." *Ibid.*[4]

2. The Swiss deposition testimony was properly admitted under Fed. R. Evid. 804(b)(1) and Fed. R. Crim. P. 15(e). Rule 804(b)(1) allows the ad-

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[4] Other courts have declined to give *Minarik* the broad reading petitioners seek to accord it, and this Court has denied certiorari notwithstanding claims that those decisions conflict with *Minarik*. See, *e.g.*, *United States* v. *Bilzerian*, 926 F.2d 1285 (2d Cir.), cert. denied, 112 S. Ct. 63 (1991); *United States* v. *Reynolds*, 919 F.2d 435, 439 (7th Cir. 1990), cert. denied, 111 S. Ct. 1402 (1991).

mission of testimony given by unavailable witnesses at "a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered * * * had an opportunity and similar motive to develop the testimony by direct, cross, or redict examination." Rule 15(e) likewise provides that "[a]t the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable."

The procedures followed in ordering and taking the Swiss depositions complied with Fed. R. Crim. P. 15. Subsection (a) of that Rule allows depositions "[w]henever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial." Petitioners do not challenge the district court finding that this case satisfied the prerequisites of subsection (a). Subsection (b) of the Rule requires adequate advance notice, and subsection (c) requires government payment of defense travel and subsistence expenses. Again, petitioners do not suggest that the Swiss deposition proceedings failed to satisfy these provisions.

Petitioners claim that the Swiss depositions failed to comply with subsection (d) of Rule 15. That provision, in pertinent part, reads as follows:

> **(d) How Taken.** Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without that defendant's consent, and (2) the scope

> and manner of examination and cross-examination shall be such as would be allowed in the trial itself.

The depositions in this case were "taken" in the manner provided in civil actions. Although cross-examination was not done "directly by counsel" (91-1367 Pet. 22), the civil rules expressly provide for "depositions upon written questions" (Fed. R. Civ. P. 31). Similarly without merit are complaints (91-1367 Pet. 16-17, 22-24) that the Swiss witnesses were not placed under oath and there was no "verbatim transcript." The federal civil discovery rules incorporated by Criminal Rule 15(d) recognize that, as the court of appeals explained (Pet. App. 22a), "[d]epositions taken in foreign countries cannot at all times completely emulate the United States' method of obtaining testimony." Thus, Fed. R. Civ. P. 28(b) provides: "Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar deparure from the requirements for depositions taken within the United States under these rules."[5] The Advisory Committee notes to Rule 28 explain:

> [T]he courts of other countries may be expected to follow their customary procedure for

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[5] The Mutual Assistance Treaty, U.S.-Switz., 27 U.S.T. 2019, T.I.A.S. No. 8302 (1973) (*reprinted in part* at Pet. App. 76a-83a), allows a request for assistance to be made by the "Central Authority" (defined as "the Attorney General or his designee") and thus obviates the need for an American court to issue a letter rogatory. No substantive difference flows from the fact that a letter rogatory was not issued in this case, however, and the clear intent of the federal rules is that foreign depositions need not follow the precise form of depositions taken in this country.

> taking testimony. In many non-common-law countries the judge questions the witness, sometimes without first administering an oath, the attorneys put any supplemental questions either to the witness or through the judge, and the judge dictates a summary of the testimony, which the witness acknowledges as correct. The last sentence of [Rule 28(b)] provides, contrary to the implications of some authority, that evidence recorded in such a fashion need not be excluded on that account. The specific reference to the lack of an oath or a verbatim transcript is intended to be illustrative.

Notes of Advisory Committee on Rules—1963 Amendment (citations omitted), 28 U.S.C. at 625.

Nor is there merit to the claim (91-1367 Pet. 16-17, 22-24) that clause (2) of Fed. R. Crim. P. 15(d) disallows foreign depositions unless witnesses are placed under oath, there is a verbatim transcript, and the examination and cross-examination are done directly by counsel. While that clause requires that "the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself," it plainly addresses the method of "examination" rather than the method in which depositions are "taken." As the court explained in *United States* v. *Salim*, 855 F.2d 944, 950-951 (2d Cir. 1988) (emphasis in original; some citations omitted):

> Rule 15(d) begins incorporating the manner of *taking* a deposition in a civil case. It then distinguishes the manner of *examining* a witness, and imposes some additional limitations with respect to the scope and manner of the latter. * * *
>
> Restrictions on the manner in which the deposition is *taken* concern such issues as the person

before whom the deposition should be taken, how the deposition should be recorded, and how transcripts should be certified and filed. By contrast, the limitation on the scope and manner of *examination* concerns the permissible subject matter and form of the questions, respectively, that may be asked of the witness. This latter provision of the rule appears to require only that the examination and cross-examination be conducted by properly formulated questions in a manner reasonably calculated to elicit admissible testimony. Thus, the additional restriction on *scope* found in Rule 15(d) limits questioning to those matters permitted under Fed. R. Evid. 401, whereas the rule applicable to civil cases permits a much broader inquiry, *see* Fed. R. Civ. P. 26(b). The restriction on the *manner* of examination limits the form of the questions, and concerns such matters as the entitlement to ask leading questions of a hostile witness, *see* Fed. R. Crim. P. 15(d)(2) advisory committee note (1974).

Contrary to petitioner David Sturman's claim (91-1367 Pet. 22-24), there is no conflict among the federal courts of appeals concerning the application of Rule 15. None of the decisions he cites found that a deposition was properly excluded or improperly admitted in evidence, nor has any court held that procedures such as those followed here do not satisfy Rule 15. Indeed, courts have upheld foreign deposition procedures far less protective of defendants' rights than those followed here. For example, *Salim* not only involved the same procedures that petitioner complains about here (*e.g.*, questioning by a French magistrate rather than the attorneys directly, partial summaries by the magistrate rather than a complete verbatim transcription, lack of formal oath) but, in addition, neither defendant nor his counsel were al-

lowed to attend the deposition. See 855 F.2d at 946-952 (describing and upholding procedures). Similarly, in other cases, defendants were not personally allowed to confront the foreign deponents. *E.g.*, *United States* v. *Gifford*, 892 F.2d 263, 264-265 (3d Cir. 1989), cert. denied, 110 S. Ct. 3243 (1990) (absence of incarcerated defendant from Belgian depositions did not violate Rule 15); *United States* v. *Kelly*, 892 F.2d 225, 260-263 (3d Cir. 1989), cert. denied, 110 S. Ct. 3243 (1990) (companion case to *Gifford*).[6] While the exact procedures vary from case to case and from country to country, the federal courts of appeals consistently have interpreted Rule 15 as flexible enough to accommodate those procedural differences.

Nor is there merit to petitioners' claims that taking the Swiss depositions and admitting the deposition testimony were unconstitutional.

a. Petitioner David Sturman argues, for the first time in this Court, that the taking of the Swiss depositions violated his Article III right to have a federal judge preside at all critical stages of his criminal "trial." 91-1367 Pet. 19-21 (citing *Peretz* v. *United*

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[6] Petitioner David Sturman claims that "[t]he Third Circuit has emphasized that the procedures the Third Circuit approves 'are in stark contrast to those approved [by the Second Circuit] in *United States* v. *Salim*' " (91-1367 Pet. 24, quoting *Kelly*, 892 F.2d at 262 n.6). But no Third Circuit (or other federal) case suggests, let alone holds, that the procedures followed in *Salim* are legally inadequate. On the contrary, the Third Circuit in both *Kelly* and the companion case of *Gifford*, like the Sixth Circuit in the present case, cited *Salim* with full approval. The *Kelly* footnote cited by petitioner, far from condemning the *Salim* procedures, simply illustrated that the claim raised in *Kelly* was factually even weaker than the claim rejected in *Salim*.

States, 111 S. Ct. 2661, 2665 (1991)); see *Gomez* v. *United States*, 490 U.S. 858, 876 (1989)). Since no party raised that claim either in the district court or on appeal,[7] this Court should not review it. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

In any event, David Sturman's Article III claim is without merit. United States District Judge George W. White presided at every stage of trial. The decision whether to admit into evidence part or all of the depositions was made at trial solely by Judge White, and the pretrial depositions were not part of the "trial" for Article III purposes. While a Rule 15 pretrial deposition may be a critical stage of the "prosecution" (91-1367 Pet. 19, quoting *Gifford*, 892 F.2d at 265)—in the same sense that a post-indictment police lineup is a critical stage of a prosecution for Fifth and Sixth Amendment purposes (see generally *Kirby* v. *Illinois*, 406 U.S. 682 (1972))—it is not, any more than a post-indictment lineup, a stage of "trial" requiring the presence of an Article III judge.

This Court's recent decision in *Peretz*, rather than supporting the Article III claim, actually undercuts it. The Court in *Peretz* held that "no [Article III] structural protections are implicated" by allowing a magis-

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[7] The trial objections, which were argued and/or adopted by petitioner David Sturman on appeal, were "based upon failure to comply with Rule 15, as well as deprivation of the confrontation clause (Sixth Amendment), a deprivation of due process (Fifth Amendment), a denial of assistance of counsel (Sixth Amendment), and a denial of a fair trial (Fifth and Sixth Amendments)." David Sturman C.A. Br. 49 (citing trial transcript). In addition, David Sturman claimed that the Swiss Supreme Court had barred deposition testimony from being used against him. See *id.* at 49-50. Nowhere, however, did any petitioner claim an Article III violation.

trate to conduct jury selection. 111 S. Ct. at 2669. The Court observed, as it had in a prior decision upholding a magistrate's power to make factual findings and legal recommendations on pretrial motions to suppress evidence, that the "ultimate decision" whether to empanel a jury is made by the district court. *Ibid.* (quoting *United States* v. *Raddatz*, 447 U.S. 667, 683 (1980)). The Article III claim in this case is even weaker than those rejected in *Peretz* and *Raddatz*, because Judge White delegated none of his judicial power to Swiss Magistrate Holdener. Instead, the Swiss magistrate's role in the pretrial collection of evidence was no different for Article III purposes than a police officer's supervision and direction of a critical pretrial lineup.

For similar reasons, there is no merit to petitioner David Sturman's claim (91-1367 Pet. 21-22) that the court of appeals' decision "ignores this Court's holdings that due process requires a disinterested judge." The "disinterested judge" in this case was District Judge White, who presided over all aspects of the trial. Petitioners' due process rights were not violated unless the participation of Swiss Magistrate Holdener, whose alleged conflict of interest was his Swiss-authorized role as both prosecutor and magistrate, rendered the depositions themselves fundamentally unfair and unreliable. Cf. *Manson* v. *Brathwaite*, 432 U.S. 98 (1977) (discussing when procedures underlying pretrial identification may be so unreliable as to violate due process). The courts below properly found, in a factbound determination not warranting further review, that petitioners "failed to establish evidence that Magistrate Holdener's handling of the deposition[s] unfairly prejudiced the defendants or that the testimony could be considered unreliable." Pet. App.

23a; see also C.A. Jt. App. 1984 (district court finding that defense has not "made a case of bias").

b. Petitioner David Sturman also claims, as do petitioners Levine and Kaminsky (91-1533 Pet. 13-18) and petitioner Reuben Sturman (91-1596 Pet. 23-25), that admitting the deposition testimony violated their Fifth and Sixth Amendment rights to examine and confront witnesses. This Court, however, has never interpreted the Constitution to prohibit all out-of-court statements from being admitted at trial. See *White* v. *Illinois*, 112 S. Ct. 736, 744 (1992) ("the admissibility of hearsay statements raises concerns lying at the periphery of those that the Confrontation Clause is designed to address"). On the contrary, hearsay evidence may be admitted without violating the Constitution as long as it bears adequate indicia of reliability. *Idaho* v. *Wright*, 110 S. Ct. 3139, 3146 (1990) (quoting *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980)).[8] Where the evidence falls within a "firmly rooted" hearsay exception, no further showing of reliability is required. *Ibid.*

The hearsay exception under which the deposition testimony was admitted—the ruling allowing "former testimony" of an unavailable witness (Fed. R. Evid. 804(b)(1))—undeniably is firmly rooted. This Court traced the history of the former testimony exception in *Mattox* v. *United States*, 156 U.S. 237 (1895), and more recent cases consistently have held

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[8] A further showing of witness unavailability is necessary where "the challenged out-of-court statements were made in the course of a prior judicial proceeding." *White* v. *Illinois*, 112 S. Ct. 736, 741 (1992) (citing *United States* v. *Inadi*, 475 U.S. 387, 394 (1986)). Petitioners do not dispute that the Swiss witnesses were unavailable to testify at trial.

that hearsay testimony admitted under the former testimony exception satisfies the Confrontation Clause. *Ohio* v. *Roberts*, 448 U.S. at 68-73; *California* v. *Green*, 399 U.S. 149, 165-166 (1970).

Nor is there force to petitioners' suggestion that the Swiss depositions were equivalent to the affidavits that this Court's Confrontation Clause cases condemn. This Court has recognized that "the particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates." *California* v. *Green*, 399 U.S. at 156; see also *White* v. *Illinois*, 112 S. Ct. at 745 (Thomas, J., concurring) (common law right of confrontation originated to curtail evidence obtained through magistrates' interrogation of witnesses at pretrial proceedings in which " '[t]he prisoner had no right to be, and probably never was, present' ") (quoting 1 J. Stephen, *A History of the Criminal Law of England* 221 (1883)). Thus, this Court has never required that former testimony be taken under procedures that exactly mirror the trial setting. See, *e.g.*, *Ohio* v. *Roberts*, 448 U.S. at 72-73; *California* v. *Green*, 399 U.S. at 165-168; *Barber* v. *Page*, 390 U.S. 719, 725 (1968). The fact that petitioners and their counsel were allowed to be present at the deposition means that, unlike most admissions at trial of out-of-court statements under a hearsay exception, petitioners had the opportunity for a "face-to-face encounter" (*Coy* v. *Iowa*, 487 U.S. 1012, 1017 (1988)) with the deponents. In addition, petitioners were permitted, through Magistrate Holdener, to pose whatever questions they wished to the witnesses. Unlike parties against whom hearsay is admitted under other exceptions, petition-

ers thus had the opportunity to cross-examine the deponents.[9]

Petitioners' specific objections to the procedures followed in the Swiss depositions also lack merit. Particularly unavailing is petitioners' objection to the lack of a verbatim transcript, because it was petitioner David Sturman's own Swiss attorneys who objected to the government's suggestion that videotape be used and an American court reporter be present. See Gov't C.A. Br. 93 & n.94.[10] In any event, evidence admitted under the former testimony exception traditionally was introduced by a witness recounting the substance of the prior testimony in cases in which a stenographic transcript was unavailable.[11] See, *e.g.*, *Ruch* v. *Rock Island*, 97 U.S. 693, 694 (1878).[12] Nor did the procedures by which the ques-

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[9] Magistrate Holdener excluded only one question, concerning the salary of one of the witnesses, and petitioners have not asserted that that single exclusion prejudiced them in any way.

[10] David Sturman's Swiss attorney, in objecting to the Swiss government's order that the deposition be held, stated:

> [I]t should be noted that the use of a videotape, as asked for in the request for judicial assistance, is not provided for by the Zurich Code of Penal Procedure and is, therefore, illegal and that the presence of a US court reporter is contrary to art. 271 of the Swiss Penal Code.

C.A. Jt. App. 958.

[11] Given that former testimony may be proved by a witness simply recounting what the declarant said, petitioners' unsupported contention (91-1367 Pet. 27) that the former testimony exception requires a verbatim transcript is mistaken. See 4 D. Louisell & C. Mueller, *Federal Evidence* § 487, at 1079 (1980).

[12] Petitioner's claim (91-1367 Pet. 27-28), raised for the first time in this Court, that the lack of a verbatim transcript

tions were posed to and answered by the witnesses render their testimony so "inherently unreliable" that the Confrontation Clause was violated. See *United States* v. *Salim*, 855 F.2d at 954-955 (rejecting Confrontation Clause challenge to foreign depositions taken in similar manner). The jury was entitled to weigh the procedural context in its consideration of the depositions because the district court instructed that the Swiss judicial system operates "a lot differently" than our system (C.A. Jt. App. 2001) and specifically pointed out that the deposition readings would reflect that the witnesses were permitted to correct and add to their answers (*id.* at 2006).

Equally without merit is petitioners' challenge to the absence of a formal oath. Each witness was admonished by the Swiss magistrate that, while Switzerland does not recognize the oath, a witness who "intentionally makes a false statement * * * will be punished [under Swiss law] with a term of up to five years in the penitentiary or imprisonment." See C.A. Jt. App. 2002. Like an oath administered to American witnesses, that admonition was "in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to [testify truthfully]." Fed. R. Evid. 603.

Finally, review of the Swiss deposition issue is not warranted because any error, constitutional or otherwise, was harmless beyond a reasonable doubt. See Gov't C.A. Br. 95 n.98, 126-136. Although petitioners quote pre-disposition statements of the prosecutor

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violated the Court Reporters Act (28 U.S.C. 753(b)) is constitutionally irrelevant and statutorily wrong. That Act applies only to "session[s] of the court" and other specifically designated court proceedings; it has never been interpreted to extend to out-of-court proceedings such as depositions.

regarding the government's need for the depositions (91-1367 Pet. 3-8), those predictive statements do not preclude a court from later reviewing the entire record with the benefit of hindsight to determine whether admission of the evidence can be said to have been harmless. In this case, petitioners ultimately were linked to the Swiss accounts by "[v]olumes of business records from seven foreign banks" that independently were admitted pursuant to a statute authorizing admission of foreign business records (18 U.S.C. 3505). See Pet. App. 39a-42a. Indeed, the lead defense counsel at trial told the district court that "for reasons which are a mystery to me, the government only asked [the Swiss deponents] to address a handful of documents compared to the documents which, once this trial began, the government offered into evidence pursuant to 18 U.S.C. Section 3505." C.A. Jt. App. 1987. In light of that far more substantial evidence linking petitioners to the conspiracy, any error in the admission of the deposition evidence was clearly harmless.

3. Petitioners Levine and Kaminsky (91-1533 Pet. 18-22), as well as petitioner Reuben Sturman (91-1596 Pet. 13-17), seek further review of their claim that 18 U.S.C. 3505, which governs the admissibility of foreign business records, violates the Confrontation Clause. Section 3505 allows the admission of foreign business records if a custodian certifies that they are kept in the regular course of business and if they meet other specified requirements "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The constitutionality of Section 3505 has been upheld by other courts, and this Court has denied certiorari in a case raising the issue. See *United States* v. *Miller*,

830 F.2d 1073, 1076-1077 (9th Cir. 1987), cert. denied, 485 U.S. 1033 (1988); *United States* v. *Davis*, 767 F.2d 1025, 1031-1032 (2d Cir. 1985); *United States* v. *Hing Shair Chan*, 680 F. Supp. 521, 522-526 (E.D.N.Y. 1988).

This Court has approved one commentator's observation that "[p]roperly administered the business and public records exceptions would seem to be among the safest of the hearsay exceptions." *Ohio* v. *Roberts*, 448 U.S. at 66 n.8. Petitioners claim that their Confrontation Clause rights were nonetheless violated because the records in this case were authenticated by affidavits of foreign custodians. Authentication of foreign business records, however, is a threshold matter for the court rather than the jury, and the normal restrictions on hearsay evidence do not apply. 18 U.S.C. 3505(b); Fed. R. Evid. 104(a); see generally *United States* v. *Tedder*, 801 F.2d 1437, 1448 (4th Cir. 1986), cert. denied, 480 U.S. 938 (1987). In any event, hearsay statements of unavailable witnesses may be admitted without violating the Constitution, as long as they bear adequate indicia of reliability. *Idaho* v. *Wright*, 110 S. Ct. at 3146; *Ohio* v. *Roberts*, 448 U.S. at 66. Section 3505 is coterminous with the Constitution in this regard, in that it expressly excludes foreign records where "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The courts below correctly determined that the certificates of the foreign custodians, which contained acknowledgments that the makers were subject to penalties under Swiss law for giving false testimony, contained adequate indicia of reliability. To the extent petitioners wished to challenge the authentications, moreover, they were free to do so during the Swiss depositions of record custodians.

4. Petitioner Reuben Sturman seeks further review in No. 91-1596 of numerous additional claims.

a. First, petitioner claims (Pet. 18-22) that he was entitled to review the government's 1981 submission to Swiss authorities in order to determine whether the government obtained Swiss bank records by accusing petitioner of being an organized crime figure. According to petitioner, such an accusation, which would have been false, allowed the government to obtain bank records to which it otherwise was not entitled under the Mutual Assistance Treaty, U.S.-Switz., 27 U.S.T. 2019, T.I.A.S. No. 8202 (1973) (*reprinted in* part at 91-1596 Pet. App. 134a-142a). Both courts below reviewed the government submission and concluded it was not false. See Pet. App. 30a. But petitioner would have no standing to challenge the transfer and admission of documents even if the government's 1981 submission was false. Article 37 of the Treaty expressly provides, with certain exceptions not applicable here, that:

> The existence of restrictions in this Treaty shall not give rise to a right on the part of any person to take any action in the United States to suppress or exclude any evidence or to obtain other judicial relief in connection with requests under this Treaty.

See Pet. App. 27a. A defendant thus lacks standing to suppress evidence obtained pursuant to the Treaty or to obtain judicial relief for alleged violations of the Treaty, or matters arising under it. *United States* v. *Davis*, 767 F.2d 1025, 1029, 1030 (2d Cir. 1985); *United States* v. *Johnpoll*, 739 F.2d 702, 714 (2d Cir.), cert. denied, 469 U.S. 1075 (1984); *Cardenas* v. *Smith*, 733 F.2d 909, 917-919 (D.C. Cir. 1984).[13]

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[13] *Cardenas*, which involved the seizure of Swiss bank accounts in which the plaintiff had an interest, recognized that

b. Second, petitioner claims (Pet. 25-27) that the district judge should have recused himself because, after petitioner was sentenced, the judge acknowledged his personal dislike of the pornography business and stated, "I have gone out of my way, very frankly, as a judge to separate in my mind the business that the defendants are in from what they are charged with." See Pet. App. 24a n.6 (quoting district court's comments). There is no merit to petitioner's suggestion (Pet. 26-27) that the court of appeals failed to apply the objective standard required under 28 U.S.C. 455 to determine whether a judge should be recused. The court of appeals quoted the statute as requiring a federal judge to recuse himself "in any proceeding in which his impartiality might reasonably be questioned" (28 U.S.C. 455(a)) and quoted its own prior case law as requiring a "determin[ation] whether a reasonable, objective person, knowing all the circumstances, would not have questioned [the judge's] impartiality." Pet. App. 25a (internal quotations omitted). The court of appeals' case-specific conclusion that the district judge's brief remarks at the close of a protracted proceeding would not cause a reasonable person to question the judge's impartiality is correct and does not warrant further review.

c. Next, petitioner claims (Pet. 27-28) that it was error for the court to impose consecutive fines on

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the Treaty cannot deprive an individual of constitutional rights. See 733 F.2d at 919. The court of appeals held (Pet. App. 28a), however, that petitioner had no constitutional right of privacy in his foreign accounts and that any privacy right "and any remedy given for a violation of that right is limited by the terms of the Treaty." Cf. *United States* v. *Miller*, 425 U.S. 435 (1976).

certain counts because the crime of filing a false income tax return (26 U.S.C. 7206(1)) is a lesser-included offense of attempted tax evasion (26 U.S.C. 7201). Filing a false income tax return is not a lesser-included offense of attempted tax evasion in the traditional sense, however, because tax evasion may be committed without even filing a tax return, and filing a false return may not result in evasion of any tax properly owed. See generally *Spies* v. *United States*, 317 U.S. 492, 499-500 (1943). Some courts have nonetheless held that cumulative punishment should not be imposed if proving the evasion of tax proves the false statement (usually an understatement of income) on the return. See Pet. 28 (citing cases). The court of appeals in this case did not reject the holdings in those cases, but instead distinguished them on the same ground as an earlier court had under facts identical to this case. See Pet. App. 36a-37a (following *United States* v. *Franks*, 723 F.2d 1482, 1487 (10th Cir. 1983), cert. denied, 469 U.S. 817 (1984)). *Franks* held that, because proof that a taxpayer evaded paying taxes does not prove that he misrepresented his control over foreign bank accounts, consecutive punishments may be imposed in such a case. That holding is not inconsistent with cases reaching a different result on different facts.

d. Finally, petitioner asks (Pet. 28-29) this Court to consider whether the reporting requirements of the Bank Secrecy Act, 31 U.S.C. 5311 *et seq.*, and its implementing regulations violate the Fifth Amendment privilege against compulsory self-incrimination. The specific statutes and regulations that petitioner violated require taxpayers to report financial interests in, or signature authority over, foreign bank accounts. See 31 U.S.C. 5314; 31 C.F.R. 103.24. The

court of appeals' decision is consistent with decisions of this Court and does not conflict with the decision of any other court.

This Court has held that the Fifth Amendment privilege against compulsory self-incrimination does not allow taxpayers to refuse to answer questions on tax forms merely because the responses may lead the government to uncover illegal sources of income or tax fraud. *United States* v. *Sullivan*, 274 U.S. 259 (1927). Since the "Bank Secrecy Act applies to all persons making foreign deposits, most of whom do so with legally obtained funds" (Pet. App. 36a), the court of appeals properly distinguished decisions of this Court holding unconstitutional those statutes requiring self-incrimination solely of a "selective group inherently suspect of criminal activity." *Marchetti* v. *United States*, 390 U.S. 39, 47 (1968) (statute requiring reporting and taxing of illegal gambling activities); *Grosso* v. *United States*, 390 U.S. 62 (1968) (similar). Here, as in *Sullivan* and more recent cases of this Court rejecting Fifth Amendment challenges to reporting requirements, the tax form questions "were neutral on their face and directed at the public at large." *California* v. *Byers*, 402 U.S. 424, 429, 433-434 (1971); see also *Selective Service System* v. *Minnesota Public Interest Research Group*, 468 U.S. 841, 858 n.16 (1984) (in rejecting Fifth Amendment claim, Court distinguished *Marchetti* and *Grosso* on ground that "anyone who asserted the privilege on a wagering return did not merely call attention to himself; the very filing necessarily admitted illegal gambling activity").

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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